Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

MEDICAL AIR TECHNOLOGY CORPORATION,

Petitioner,

v.

MARWAN INVESTMENT, INC., MARWANI HOLDING COMPANY, N.V., MULTIFINANCE HOLDING CORPORATION, and DR. K. PHILIP RAHBANY,

Respondents.

On Petition For Writ Of Certiorari From The United States Court of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the First Circuit erred in affirming the District Court's ruling that a controlling, albeit minority, shareholder in the plaintiff, a closely-held corporation did not violate its duty of utmost good faith and loyalty to the corporation under Massachusetts law when it cast dissenting a vote, catastrophic in its consequences to that corporation, blocking an extremely favorable merger, where that vote was based on the dissenting shareholder's own financial interests and business purposes, and not those of the corporation, in light of the uncontroverted admissions at trial that the vote was not to serve a legitimate business interest of the corporation, but rather was to serve the business interests of the blocking shareholder, and those of an affiliate, which was foreclosing the assets of the corporation.

2. Whether the Court of Appeals erred in upholding the District Court's allowance of defendants' motion to strike plaintiff's jury claim as to all parties, based upon a jury waiver in a security agreement between the plaintiff, and only one of the four defendants, and where there was no evidence the plaintiff knowingly, intelligently and voluntarily waived its rights to a jury as to the other defendants when it entered into a complicated transaction, evidenced by over twenty documents between the parties, none of which, except the security agreement, contained a jury waiver.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Medical Air Technology Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the First Circuit (Pet. App. 1a-24a) is reported at 303 F.3d 11. The opinion of the District Court (Pet. App. 29a-48a) is not reported.

JURISDICTION

The opinion of the Court of Appeals was issued on August 14, 2002. The jurisdiction of this court to review the judgment of the First Circuit is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment of the United States Constitution provides, in pertinent part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to a trial by jury shall be preserved..."

STATEMENT OF THE CASE

Medical Air Technology Corporation (Medical Air) is a closely held corporation incorporated in December of 1992, which sold air purification equipment to medical facilities. In search of financing, Medical Air executed an agreement in January 1996 with Multifinance Holding Company (MFH). MFH used two related companies, Marwan Investment and Marwani Holding Company, to

structure the deal. Dr. Kalil Philip Rahbany was the President of MFH and an agent of Marwan Investment and Marwani Holding. The agreement resulted in a total of $1.375 million in funding for Medical Air: a $625,000 loan from Marwan Investment and a $750,000 purchase of preferred stock by Marwani Holding. The transaction closed on January 22, 1996. Medical Air signed over twenty documents, including an Investment and Stockholders Agreement, a Secured Promissory Note for the loan, and a Security Agreement.

The Security Agreement was executed by Medical Air and Marwan Investment only, and served to secure the loan from Marwan Investment. Of all the documents signed, the Security Agreement alone contained a jury waiver, which provided that:

> "Grantor [Medical Air] and Marwan hereby waive their respective rights to a jury trial of any claim or cause of action based upon or arising out of this Security Agreement, the Investment and Stockholders Agreement or any other agreement evidencing, securing, or otherwise executed in connection with any Obligations."

Within a few months, the parties' relationship had soured. Medical Air began to have cash flow problems. In May 1996, it failed to meet the minimum net worth and net working capital requirements to which it had agreed in the Investment and Stockholders Agreement.

Medical Air tried to work its way out of the situation. It attempted to obtain the defendants' permission to issue additional stock in the hope that increased funding would allow it to expand its production capacity to take advantage of sales opportunities. The defendants opposed this plan. Medical Air then presented the defendants with the possibility of a buy-out by an outside investor. The defendants were not interested.

Instead, between July 8 and August 15, 1996, the

defendants sent three separate notices of default to Medical Air and threatened litigation. Efforts made to restructure the business were unsuccessful. In the August 15 notice, Marwan Investment exercised its right to demand acceleration of the loan and, the following month, Marwani Holding requested that Medical Air redeem its stock.

By the fall of 1996, Medical Air was out of money to fill orders, a fact well known to the defendants, who had hired their own consultants, including a lawyer specializing in bankruptcies, to meet with and monitor Medical Air's management. In response to this predicament, and the refusal of the defendants to inject, or permit the injection of, new capital into the company, Medical Air began to look for a new investor to buy out the defendants.

Nortek, Inc., a publicly traded Rhode Island company, with a complimentary product line which was growing by aggressively acquiring smaller companies, quickly became interested in Medical Air. On November 8, 1996, Nortek and Medical Air signed a non-binding letter of intent to merge, which proposed that Medical Air's shareholders would receive 500,000 shares of Nortek common stock, worth at that time about seven million dollars, and Marwan Investment's note would be paid in full. Medical Air quickly scheduled a shareholders' meeting for January 8, 1997. Notices of the meeting and proxy were sent to Medical Air shareholders on December 19, 1996.

Rahbany knew the possibility of this merger nearly two months before the vote. On November 19, 1996, after receiving Nortek's letter of intent, Rahbany requested from Medical Air the due diligence material provided to Nortek as part of the proposed merger. Rahbany never received copies of what had been provided to Nortek. Medical Air, for its part, was "reluctant to produce the documents because" corporate officials felt that the defendants were "going fishing" for evidence for their litigation in the default suit. Medical Air asked the defendants to identify the specific due diligence items they wanted, and the reasons

for each. The defendants refused.

Rahbany never sought to meet with anyone at Medical Air or Nortek in the two months before the vote on the merger to discuss the potential deal. He understood that Medical Air was a closely held corporation and that, as a preferred shareholder, Marwani Holding had a fiduciary relationship to the corporation.

On December 31, 1996, Medical Air sent a draft merger agreement and certain other draft documents it had received from Nortek to shareholders for review. According to the testimony of the Medical Air attorney who worked on the deal, merger terms are never final until the closing, and it is customary for shareholder votes to take place before the merger documents are finalized.

Five days before the scheduled vote, representatives of Medical Air and the defendants met to discuss the proposed merger. At that meeting, the defendants asked for certain information, including a valuation of the company, and Medical Air's November financial statements. Medical Air provided the November financial statements, and a valuation of the defendants' stock under the proposed merger plan (between $1.4 and $1.8 million) to the defendants' counsel on the following day.[1] Rahbany says he was not given sufficient information to determine if that valuation was a credible number. Rahbany admitted at trial that he never reviewed the public records of Nortek to try to assess the basis for Nortek's interest in Medical Air.

The Medical Air shareholders met on January 8, 1997. Although all other shareholders voted for it, Marwani Holding, owning almost 15% of the shares, was able to single-handedly defeat the merger because Nortek, as part of the proposed merger agreement, had required a minimum of 95% stockholder agreement.

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[1] In the period between Medical Air's execution of a letter of intent with Nortek and the January 8, 1997 shareholder's vote, the value of the 500,000 shares of Nortek stock had increased to nearly $10,000,000.

At trial, Joseph Bodoff, the defendants' bankruptcy attorney, admitted that, prior to the January 8, 1997 shareholders' meeting, had done an analysis of how "short Dr. Rahbany was going to be as a result of the proposed merger" and concluded it could be as much as $1 million. Bodoff testified that, immediately after he tendered Marwani Holding's "no" vote, he told Medical Air's attorney that the principals of Medical Air were "getting a lot of money from the transaction" and that, in his "experience as an attorney there's no case that can't be settled with money." Medical Air's attorney testified that Bodoff told him he was voting against the merger because they felt "the transaction was a little bit too rich in favor of certain principals in the company", and that "money cures all ills or money could make it better, something like that".

Rahbany claimed at trial he was short of the substantive elements of the due diligence materials and, since he did not get them, he voted against the merger. He stated that he wanted the "business forecasts" of Medical Air. He maintained that he had to see those forecasts in order to determine the viability and sustainability of the negotiations with Nortek. However, Rahbany admitted at trial that, at the time of the vote, he knew of Medical Air's dire financial condition, in part because Medical Air had disclosed in July of 1996 that the company was running out of cash. Rahbany testified he that the value of the company was virtually zero at that time.[2]

Rahbany was asked at trial "(w)hat legitimate business purpose of Medical Air was served in voting against the merger(?)" He answered "(b)ecause I wanted at the same time to know how viable, to find the basis,

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[2] At the time of the vote, Marwan Investment was pursing its right to hold a secured party sale of all of Medical Air's assets. That sale subsequently occurred and Marwan Investment was the purchaser. It is undisputable that Marwani Holding's "no" vote paved the way for the Marwan foreclosure.

because I had a fiduciary responsibility to cast a vote, and I had to have a reasonable basis for my action. And when you don't know what you're doing, you don't do anything."

The trial court was satisfied this answer was responsive to the question and would not permit Rahbany to answer the question "(w)hat business purpose did your voting against the proxy serve of Medical Air Technology?"

Rahbany admitted at trial that one of the purposes of his vote was to advance the purposes of Marwan Investment, but claimed he "had in mind the multiple entities that [he] represented all the time and also the separateness all the time."

Medical Air failed to meet its fourth quarter 1996 projections; it had projected sales of $750,000 for the quarter, but realized only $236,000. Medical Air blames this failure on its problems with the defendants, which it said were distracting its principal officers from business and demoralizing its sales force.

After the January 8, 1997 vote, negotiations with Nortek were reopened, at a lesser price, because Medical Air had failed to meet its fourth quarter projections. Later in January 1997, Medical Air and Nortek signed a second letter of intent to merge. This time Nortek offered 250,000 shares, providing that the base purchase price would not exceed $6.25 million. The second letter of intent provided an opportunity, with good performance, for Medical Air to earn substantially more. The second letter of intent was not dependant on Medical Air meeting any projections, but did require, as of the closing date, there be no "material adverse change in the business of the Company, including the assets, financial condition, projections and prospects of the Company since December 31, 1996." No such change occurred.

Although the terms of the second letter of intent were acceptable to Medical Air's management, the merger ultimately did not go through, since, among others, Medical Air's management did not believe that, given the defendants' veto of the original transaction, they would

approve of a merger at a lesser price.

In April 1997, Medical Air filed a diversity suit in the District of Massachusetts, seeking a declaration that it was not in default to the defendants, an injunction against the sale of its assets, and damages for breach of contract, negligence and other claims based on Marwani Holding's vote against the merger. On January 26, 1998, the district court found that, as of May 1996, Medical Air was in default of its responsibilities under the Investment and Stockholders Agreement, and permitted Marwan Investment to sell Medical Air's assets. Medical Air Tech. Corp. v. Marwan Inv., Inc., No. 97-10764-JLT (D. Mass. Jan. 26, 1998). Medical Air did not appeal this judgment.

In August 1998, Marwan Investment began foreclosure proceedings against Medical Air. At public auction in November 1998, it bought all of Medical Air's remaining assets for $150,000.

On August 10, 2000, the defendants filed a motion to strike Medical Air's jury demand. No hearing was scheduled. The parties were in court on January 12, 2001, on an unrelated matter. That day, which was ten days prior to the scheduled start of trial, and without any prior notice to the parties, the district court announced it would hear argument on the jury waiver issue. Medical Air's counsel conceded the Security Agreement was a valid waiver of the right to jury with respect to Marwan Investment only, and stated that Medical Air had not waived jury trial for any of the other defendants. The court did not conduct an evidentiary hearing; both parties had submitted affidavits.

Despite Medical Air's objection, on January 17, 2001, the court allowed the motion to strike the jury demand without issuing a written order explaining the basis for its decision. (Pet. App. 49a). As noted by the Court of Appeals (Pet. App. 10a-11a), the trial judge apparently believed that, in a case arising out of a single transaction and presenting claims against multiple

defendants, a waiver against one was a waiver against all.[3]

Three of Medical Air's claims remained for trial: 1) breach of contract and of the implied covenant of good faith and fair dealing as to MFH and Marwani Holding; 2) breach of fiduciary duty as to Marwani Holding; and 3) tortious interference with contractual and business relations as to all the defendants.

At the conclusion of the four-day bench trial, the district court ruled for the defendants on each of Medical Air's claims and entered judgment in the amount of $1,015,236, plus post-trial interest, for Marwan Investment on its counterclaim based on Medical Air's default of the Investment Agreement. Med. Air Tech. Corp. v. Marwan Inv., Inc., No. 97-10764-JLT (D. Mass. Aug. 21, 2001). (Pet. App. 27a).

Medical Air appealed, presenting two claims of error: 1) that the district court applied the wrong legal standard for a shareholder's fiduciary duty to a closely held corporation; and 2) that the district court judge improperly found that Medical Air had waived its right to a jury trial

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[3] The district court stated, "If I understand correctly, regardless of whether you think -- you talk in terms of integrated documents or anything else, it is very, very clear that the plaintiff waived jury; is that right?" Medical Air's counsel responded by arguing that the only waiver was in the Security Agreement, and it applied only to Marwan Investment. The judge then said:

> But you did waive. With respect to this case, you waived jury.
>
> . . .
>
> Do you know of any precedent where you can waive with respect to one defendant and not with respect to another? I have never tried a case like that. I would not know how to preside. . . . I am just talking about within the cast, the traditional cast, of a transaction, one plaintiff, four people, some actual signatory, some by inference, perhaps, but the plaintiff says, I waive jury. Doesn't that count for everything?

against all of the defendants, and not just one of the defendants. The First Circuit affirmed the district court's judgment, on the grounds the defendants were not in breach of any fiduciary duties owed, and because there was no evidence that the defendants' actions caused the harm that Medical Air suffered. It held that Medical Air's claim, if any, to a jury trial was irrelevant to the outcome of the case.

REASONS FOR GRANTING THE WRIT

I. BECAUSE THE COURT OF APPEALS MISAPPLIED THE LAW OF THE DUTY OWED BY SHAREHOLDERS IN A MASSACHUSETTS CLOSELY HELD CORPORATION, THIS COURT SHOULD REVERSE THAT DECISION, AND ORDER A NEW TRIAL, BEFORE A JURY, OF MEDICAL AIR'S CLAIMS FOR BREACH OF FIDUCIARY DUTY.

This is one of those relatively rare cases where, since the material evidence of Marwani Holding's selfish motivation and lack of consideration for the well being of Medical Air is uncontroverted, and the catastrophic effects of the vote upon Medical Air conceded, an appellate court need accord no special deference to the district court's ability at a bench trial to assess the witnesses. The trial court's erroneous legal determinations, upheld by the Court of Appeals, require reversal and a new trial.

a. Standard of Review Applicable to the Trial Court's Legal Determinations

When a district court conducts a bench trial, its legal determinations engender de novo review. Smith v. F.W. Morse & Co., 76 F.3d 413, 420 (1st Cir. 1996). When, as in this case, a trial court "premise[s] its ultimate finding . . . on an erroneous interpretation of the standard to be applied," an appellate court does not use clear-error review, United States v. Parke, Davis & Co., 362 U.S. 29, 44

(1960), but treats the trial court's conclusion as a question of law, which it has the power to reverse. See, United States v. Singer Mfg. Co., 374 U.S. 174, 194 n.9 (1963) (conclusion derived from the court's application of an improper standard to the facts may be corrected as a matter of law.); Parke, Davis, 362 U.S. at 44 (noting that in such circumstances, the appeals court is "reviewing a question of law, namely, whether the District Court applied the proper standard to essentially undisputed facts"); Bergersen v. Commissioner, 109 F.3d 56, 61 (1st Cir. 1997) (noting that with mixed questions of law and fact "once the raw facts are determined, deciding which legal label to apply to those facts is a normative decision--strictly speaking, a legal issue").

Here the Court of Appeals failed in its obligation to reverse a District Court outcome based on mistake in applying controlling legal principles. No deference to the trial court's "first hand" opportunity to assess the witnesses exists in such a case. Vinick v. United States, 205 F.3d 1, 6-7 (1st Cir. 2000) ("(t)he case for deference vanishes when a court's ultimate conclusion is infected by legal error."); Inwood Labs v. Ives Labs., 456 U.S. 844, 855 n.15 (1982).

b. The Fiduciary Duty Owed by Controlling Shareholders in a Closely held Corporation

In Massachusetts, shareholders in a close corporation owe a duty of utmost good faith and loyalty to the corporation and to other shareholders. Donahue v. Rodd Electrotype Co. of New England, Inc., 367 Mass. 578, 598 (1975). In such a corporation, often "the owners are quite dependent upon one another for the success of the enterprise..." *Id.* at 587, and are thus bound by this "strict, good faith standard." *Id.* at 593. All shareholders, including minority shareholders (like Marwani Holding), are bound by the duty. See Smith v. Atlantic Properties, Inc., 12 Mass. App. Ct. 201, 208-09 (1981).

This rule means that shareholders may not put their own interests ahead of that of the company, and may not take action based on "avarice, expediency, or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation." Blank v. Chelmsford Ob/Gyn, P. C., 420 Mass. 404, 408 (1995). Since the claim is often made that complained of shareholder action was motivated by such selfish, and thus not proper corporate, purposes, Massachusetts courts have established the requirement that when, as here, a breach of fiduciary duty is alleged, the burden is on the controlling shareholder to show that the challenged conduct served a legitimate purpose of the corporation and the remaining shareholders. Zimmerman v. Bogoff, 402 Mass. 650, 657-8 (1988). (emphasis added).

C. Both the Court of Appeals and the District Court Misapplied of the Law of Fiduciary Duty Owed in a Closely held Corporation in Massachusetts

This Court's focus should be on the crucial inquiry of whether the lower courts appreciated, and properly applied, the duty a controlling shareholder owes in a Massachusetts closely held corporation. The discussion below shows both courts misunderstood, and thus misapplied, the law to the uncontroverted facts in this case.

Both the trial court and the Court of Appeals incorrectly concluded that Marwani Holding could properly discharge its fiduciary duties to Medical Air by voting against the Nortek merger, an action that Marwani Holding admitted served its business purposes and that of its affiliate, Marwan, and not those of Medical Air.[4]

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[4] The district court misstated applicable Massachusetts law when he wrote on Page 9 of the Decision "but where a breach of the fiduciary duty is alleged, the defendant may show that it acted for a legitimate business purpose to assure that the affairs of the corporation were managed effectively in the best interest of all.

Marwani Holding's vote against Medical Air's $10 million merger with Nortek thwarted that merger. At the time of the vote, Medical Air's situation was extremely dire, a fact well known to Marwani Holding. The company had effectively run out of operating capital, and Marwani Holding, and its affiliate, Marwan Investment, had sent Medical Air default notices. The Court of Appeals recognized this fact in its decision ("The parties agree that, by the fall of 1996, Medical Air was out of money to fill orders and, to put it mildly, not doing well.") (Pet. App. 5a). Medical Air's only hope for survival lay in the Nortek merger. [5]

In his decision, the district court judge wrote "Marwani Holding did not know the basis for the merger, the final terms of the merger or the price that would be paid by Nortek for the merger. Lacking this information, Marwani Holding certainly had a legitimate business purpose for voting against the merger." (Pet. App. 39a).

Wilkes v. Springside Nursing Home, 370 Mass. 842, 850-51." (Pet. App. 37a-38a). There is no "effective management" concept articulated in Donahue and its progeny, and certainly none set out on the pages 850-1 of Wilkes. Even if this were the law, as the discussion below shows, there is nothing in the record to support the claim that Marwani Holding's vote assured that the affairs of the corporation were managed effectively, or in the best interests of the shareholders.

[5] The Court of Appeals determination that "no reasonable jury could conclude" the Nortek merger was to occur is misplaced. (Pet. App. 15a). To begin, according to the Medical Air attorney who worked on the deal, merger terms are never final until the closing, and it is customary for shareholder votes to take place before the merger documents are finalized. Nortek had a compatible product line and was in a highly acquisitive state at the time. Furthermore, Nortek's actions in entering into the January letter of intent, albeit at a reduced base merger amount, compel the conclusion that sufficient fact existed for a jury to conclude Nortek was prepared acquire Medical Air for a lesser amount.

(emphasis added).

The Court of Appeals approved of this reasoning when it wrote: "Medical Air mischaracterizes the trial court's holding. The trial court held that Marwani Holding had a legitimate purpose in voting against the merger when it had not been provided material information about the merger and perceived a risk that the proposed merger was made of gossamer. That legitimate purpose is not negated if Marwani Holding's vote also coincided with its self-interest." (Pet. App. 18a). This is not the law. Inescapably, Marwani Holding's vote was for its financial gain and very much against public policy. Compare, Merola v. Exergen, 423 Mass. 461 (1996) (Although there was no legitimate business purpose for the termination of the plaintiff, neither was the termination for the financial gain of majority or contrary to established public policy).

The courts below in this action are wrong to rely on the fact that the Investors and Stockholders Agreement contained a provision by which, at a certain per share merger price, and by certifying to that price, Medical Air could compel Marwani Holding to vote for the merger.[6] Simply because such a provision exists does not absolve Marwani Holding of its duty of utmost good faith and loyalty.

A case closely analogous to the present action is Smith v. Atlantic Properties, Inc., 12 Mass. App. Ct. 201, 208-09 (1981). In Smith, a minority shareholder in a close corporation, owning 25% of the oustanding stock, vetoed a proposed distribution of dividends for personal tax reasons. This veto, permitted by the articles of organization, which required 80% of the stock to approve the dividend, caused

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[6] Section 5.3 of the Investors and Stockholders Agreement, which prohibited Medical Air from merging with another entity without the prior written consent of both Marwan and Marwani Holding, except where the per share consideration for the merger exceeded the "Qualifying Price" described in Section 5.3 and Medical Air's directors so certified.

the corporation to suffer tax penalties. Even though the corporate organizational documents granted the defendant veto power, the appeals court held that the shareholder's refusal to accept the dividends was reckless and unjustified, and that the vote was inconsistent with any reasonable interpretation of a duty of utmost good faith and loyalty.

As in Smith, Marwani Holding was a controlling shareholder, even though it was in the minority. There the similarity to Smith ends. The actions of the defendants in the present case are actually much worse than those ruled unlawful in Smith, where there the defendant, for his own purposes, "recklessly ran serious and unjustified risks" of incurring a tax penalty. *Id. at 209.* Here, the defendants had to have known the catastrophic consequences of their vote, and intended that the veto either get them more money or control of Medical Air's valuable assets.

d. Defendants Failed in Their Burden to Demonstrate a Legitimate Business Purpose of Medical Air Which was Served by the Vote Against the Merger

When, as here, a breach of fiduciary duty is alleged, the burden is on Marwani to show that the challenged conduct served a legitimate purpose of Medical Air. Zimmerman v. Bogoff, 402 Mass. 650, 657-8 (1988). The unchallenged evidence, as set out in the decisions of both lower courts, compels the conclusion that defendants have failed to meet that burden. There is no case in Massachusetts which stands for the proposition that a controlling shareholder's business purposes trump those of the corporation, and that such a shareholder may prefer its self interest to the good of the corporation. Furthermore, no Massachusetts case stands for the proposition that lack of information is a legitimate business purpose. Marwani Holding had all the information it needed; its vote against the merger would crush Medical Air.

Both the trial court and the Court of Appeals recognized it was Marwani Holding's burden to act with the

utmost good faith and loyalty toward, and in the best interests of, Medical Air, and to demonstrate a legitimate business purpose for its "no" vote. Both concluded that the defendants had met that burden. In light of the point blank admissions of Rahbany and his attorney and adviser, Bodoff, each court's analysis of what is a legitimate business purpose, and whose legitimate business purposes may be satisfied in the operation of a closely held corporation, constitute, as a matter of law, reversible error.

At trial, Marwani Holding's president, Rahbany, a) was unable to articulate any legitimate business purpose of Medical Air's that was served by the vote against the merger, and b) admitted the vote served the business purposes of Marwan Investment, which was in the process of, and ultimately foreclosed on, Medical Air's assets.

i. Marwani Holding's President Could not Articulate a Legitimate Medical Air Business Purpose for His Vote

In reply to the question "(w)hat legitimate business purpose of Medical Air was served in voting against the merger(?)", Rahbany testified "(b)ecause I wanted at the same time to know how viable, to find the basis, because I had a fiduciary responsibility to cast a vote, and I had to have a reasonable basis for my action. And when you don't know what you're doing, you don't do anything." The trial court was satisfied this answer was responsive to the question and would not permit Rahbany to answer the question "(w)hat business purpose did your voting against the proxy serve of Medical Air Technology?"

Rahbany's testimony about what he thought would occur if the merger was not voted on is as illogical and nonsensical as his attempt to articulate a legitimate Medical Air business purpose. Consider this exchange. "Q. What alternative did you expect would occur if in fact the merger did not -- this merger was not voted on? A. For them, with the forbearance at that time, not a legal

concept but a disposition, waiting time, for them to mend their ways for them to restore their viability." [7]

ii. Marwani Holding's President Admitted the Vote was to Serve the Defendants' Business Interests; Its Attorney's Testimony Shows a Further Selfish Motivation

Rahbany's testimony compels the conclusion his vote was designed to serve the business interests of the defendants, both of which, by January 7, 1997 had declared Medical Air in default and each of which was pursuing its remedies against Medical Air for that default. He admitted at trial that it was in Marwan Investment and Marwani Holding's interests that he authorized the vote against the Nortek merger. Rahbany was asked "(t)he purpose of your vote was to advance the benefit of Marwan Investment, correct?", and answered "(t)hat was in part so, yes." He admitted in connection with the vote that he was "interested in the business purpose of Marwan, the lender ... and Marwani."

Bodoff's testimony suggests Marwani Holding's refusal to vote for the Nortek merger was based on a belief that Medical Air's principals were getting a lot of money from the merger, and the defendants not getting enough.

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[7] Although theoretically possible, this is not a case where it could be argued that the vote against the merger benefited both the defendants and Medical Air. Rahbany admitted at trial that, at the time of the vote, he knew of Medical Air's dire financial condition. Medical Air had disclosed to him six month's earlier that the company was running out of cash. Rahbany testified that the value of the company was virtually zero at the time of the vote. Marwani was pursing its right to hold a secured party sale of all of Medical Air's assets, which subsequently occurred and at which Marwan was the purchaser. Furthermore, all of the remaining Medical Air shareholders voted for the merger. It is undisputable that Marwani Holding's "no" vote paved the way for the Marwan foreclosure, and did Medical Air no good.

The basis for this statement was his earlier "calculation of how short Dr. Rahbany was going to be...". Bodoff admitted that, immediately after he tendered Marwani Holding's vote, he told Medical Air's attorney that, in his "experience as an attorney there's no case that can't be settled with money." Both Bodoff and Medical Air's attorney agree that Bodoff made statements intimating that a payment of money to the defendants might be a way to resolve any differences.

e. A Less Harmful Alternative Existed to a "No" Vote

Even if this Court were to find Marwani Holding had met its burden of establishing a legitimate business purpose in voting against the merger, Medical Air must still prevail, since there existed a less harmful alternative to the veto.

"When an asserted business purpose for their action is advanced by the majority...we think it is open to minority shareholders to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest. See Schwartz v. Marien, 37 NY2d 487, 492 (1975) {and further citations}. If called on to settle a dispute our courts must weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative." Wilkes v. Springside Nursing Home, 370 Mass. 842, 851-2 (1976). (emphasis added).

There was nothing to prevent Marwani Holding from voting for the merger, and tendering its vote in escrow, subject to the successful culmination of the merger. As in the case of an outright vote, the defendants were fully protected. Marwan Investment was protected with a first security interest in all Medical Air's assets, none of which was wasting. Nortek was not requiring any relinquishment of the defendants' rights to proceed under the default notices, and as a matter of law, the defendants would have relinquished none of their rights, under the Investors and

Stockholders Agreement or related documents, in voting for the merger. There was no urgency, and no harm to voting for the merger. If the merger had gone forward, as was pointed out to one of Rahbany's attorneys, Marwani Holding would have doubled its investment, and Marwan Investment repaid with interest If the merger did not go forward, the defendants would have been in the same position they were in before the vote.

II. ON REMAND, MEDICAL AIR IS ENTITLED TO A JURY TRIAL ON ALL CLAIMS AGAINST ALL DEFENDANTS EXCEPT MARWAN INVESTMENT, SINCE MEDICAL AIR DID NOT WAIVE ITS RIGHTS TO A JURY TRIAL AS TO THOSE DEFENDANTS

a. All Parties Have a Fundamental Right to a Jury Trial

A jury trial under the Seventh Amendment to the United States Constitution is a fundamental right that ensures that litigants will have their disputes heard by individual citizens and not by courts that may seek to aggrandize their power.

b. A Contractual Waiver of a Jury Trial Must be Strictly Construed, and Binds Only the Party to the Contract—There is no Evidence Medical Air Abandoned its Jury Claims in Signing the Security Agreement

While a jury right can be contracted away, such a contract must be strictly construed. As the Court of Appeals correctly wrote: "There is a presumption against denying a jury trial based on waiver, and waivers must be strictly construed. Aetna Ins. Co. v. Kennedy ex rel. Bogash, 301 U.S. 389, 393 (1937) ("[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."); Paracor Fin., Inc. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1166 n.21 (9th Cir. 1996). In a diversity jurisdiction suit, the enforcement of a

jury waiver is a question of federal, not state, law. See Simler v. Conner, 372 U.S. 221, 222 (1963)." (Pet. App. 12a-13a).

A contractual waiver binds only the parties who sign the contract. See, EEOC v. Waffle House, Inc., 122 S. Ct. 754, 764 (2002) ("It goes without saying that a contract cannot bind a nonparty."). Courts look to the plain language of the contract's jury waiver to determine whether it unambiguously covers the claims asserted. In the present action, with only one of the four defendants a signatory to the waiver, it can hardly be said that the language of the Security Agreement was an unambiguous abandonment of Medical Air's right to a jury trial against the remaining defendants.

c. In Addition to no Evidence of a Waiver, There is no Basis to Conclude Such Waiver was Knowing and Voluntary

Here, the district court's decision on the jury waiver fails for two reasons; first, as discussed above, it is based on erroneous conclusion that the spread of the waiver in one document out of twenty, signed only by Medical Air and Marwan Investment, somehow reached all the way to the remaining, non-signing defendants. The second reason it fails is that there was no evidence before the court of a knowing and voluntary waiver. Courts will not enforce a jury waiver unless it was entered into knowingly and voluntarily. See, Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1563 (Fed. Cir. 1990); Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837 (10th Cir. 1988). In its decision, the Court of Appeals acknowledged that, in cases such as this, where the jury waiver was part of a separate contract, signed only by certain parties to the larger transaction, non-signatory parties seeking enforcement of the waiver have a more difficult task in showing that the waiver was voluntary and knowing. (Pet. App. 14a). Here, no such showing was made before the district court.

d. The Court of Appeals Did Not Uphold the District Court's Decision Striking the Jury Claim, but Wrongly Concluded that Decision was Irrelevant to the Outcome of the Case

The Court of Appeals' opinion shows it was troubled by the district court's decision to strike the jury claims against the remaining defendants, and noted "the confusion in the record". This is hardly a surprise since the district court announced, without warning on the day it struck the jury trial, that it would consider that motion along with the already scheduled motion for summary judgment, and then, struck the jury claims without issuing a written order in any way explaining the basis for its decision. The failure to issue such a decision underscores the trial court's utter lack of reliance upon any precedent in depriving Medical Air of its fundamental constitutional right.

It is abundantly clear the Court of Appeals saw it this way, when it wrote, "However, it appears that the trial judge believed that in a case arising out of a single transaction and presenting claims against multiple defendants, a waiver against one was a waiver against all." (Pet. App. 10a).

The Court of Appeals, charitably characterizing the record supporting the trial court's ruling as "sparse", then "resolved" Medical Air's objections to the District Court's handling of the jury waiver issue by determining that "no reasonable jury could find liability for breach of fiduciary duty against Marwani Holding nor a causal link between Marwani Holding's vote at the January 8 board meeting and the failure of the proposed merger with Nortek." (Pet. App. 15a).

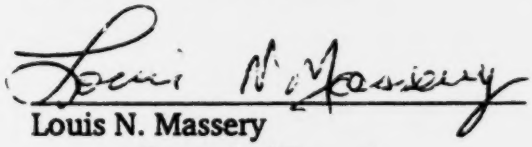
The Court of Appeals determination that "no reasonable jury could conclude" the Nortek merger was to occur is misplaced. According to the Medical Air attorney who worked on the deal, merger terms are never final until the closing, and it is customary for shareholder votes to

take place before the merger documents are finalized. Nortek had a compatible product line and was in a highly acquisitive state at the time. Furthermore, Nortek's actions in entering into the January letter of intent, albeit at a reduced base merger amount, compel the conclusion that sufficient facts existed for a jury to conclude Nortek was prepared acquire Medical Air for a lesser amount. Judging the credibility of these witnesses should have been left to the jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



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Dated: November 10, 2002

United States Court of Appeals
For the First Circuit

No. 01-2348

MEDICAL AIR TECHNOLOGY CORPORATION,
Plaintiff, Appellant,

v.

MARWAN INVESTMENT, INC.; MARWANI HOLDING COMPANY, N.V.; MULTIFINANCE HOLDING CORPORATION; AND DR. K. PHILIP RAHBANY,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, U.S. District Judge]

Before

Torruella, Circuit Judge,
Coffin, Senior Circuit Judge,
and Lynch, Circuit Judge.

Louis N. Massery with whom Massery & Gillis, LLP, Albert L. Farrah Jr., and Corwin & Corwin, LLP were on brief for appellant.

James W. Prendergast with whom Michael G. Bongiorno, Peter J. Kolovos, Barbara Van Gorder, and Hale and Dorr LLP were on brief for appellees.

August 14, 2002

LYNCH, Circuit Judge. Medical Air Technology appeals a judgment rendered after a bench trial involving a closely held corporation's financial travails and allegations of fiduciary violations by one of its investors. The plaintiff Medical Air, the closely held corporation, presents two claims of error: 1) that the district court applied the wrong legal standard for a shareholder's fiduciary duty to a closely held corporation; and 2) that the district court judge improperly found that Medical Air had waived its right to a jury trial against all of the defendants, and not just one of the defendants. We affirm the district court's judgment, because the defendants were not in breach of any fiduciary duties owed, and because there was no evidence that the defendants' actions caused the harm that Medical Air suffered. The reasoning we use in affirming that judgment renders Medical Air's claim, if any, to a jury trial irrelevant and disposes of all claims in the case.

I.

Medical Air is a closely held corporation, incorporated in 1992, which sold air purification equipment to medical facilities. In search of financing, Medical Air executed an agreement in January 1996 with Multifinance Holding

Company ("MFH"). MFH used two related holding companies, Marwan Investment and Marwani Holding Company, to structure the deal. Dr. Kalil Philip Rahbany was the President of MFH and an agent of Marwan Investment and Marwani Holding.

The agreement resulted in a total of $1.375 million in funding for Medical Air: a $625,000 loan from Marwan Investment and a $750,000 purchase of preferred stock by Marwani Holding. Medical Air signed an Investment and Stockholders Agreement, a Secured Promissory Note for the loan, and a Security Agreement. It also amended its Articles of Organization. The Security Agreement was executed by Medical Air and Marwan Investment only and served to secure the loan from Marwan Investment. It contained a jury waiver, which provided that:

> Grantor [Medical Air] and Marwan hereby waive their respective rights to a jury trial of any claim or cause of action based upon or arising out of this Security Agreement, the Investment and Stockholders Agreement or any other agreement evidencing, securing, or otherwise executed in connection with any Obligations.

The Security Agreement defines "Obligations" as:

> any and all indebtedness, obligations, agreements and liabilities of either Grantor to Marwan including, without limitation, all indebtedness and obligations of Grantor under the Investment and Stockholders Agreement, the Notes executed pursuant thereto, and any other indebtedness, obligations, agreements and liabilities of Grantor to Marwan of every kind and description, direct or indirect, absolute or contingent, due or to become due, regardless of how they arose or were acquired, now existing or hereafter arising.

MFH and Medical Air also entered into a Consulting Agreement, under which MFH would provide specified consulting services to Medical Air for the fee of $4,000 a month. Medical Air's President, Frank Paradise, took the lead in negotiating the deal. Medical Air was represented by counsel in the negotiations and the drafting of the investment agreements, as were the defendants.

Within a few months, the relationship had soured. In May, 1996, Medical Air failed to meet the minimum net worth and net working capital requirements to which it had agreed in the Investment and Stockholders Agreement. The Investment and Stockholders Agreement specified that if Medical Air defaulted on these terms, then Marwan Investment could accelerate the loan, making it immediately payable, and Marwani Holding could immediately seek to redeem its stock. If Medical Air failed to redeem the stock within six months, under the amended Articles of Organization, its Board of Directors would double in size plus one, and Marwani Holding could appoint the new Board members. Thus, if the stock was not redeemed after default, control of Medical Air would shift to Marwani Holding.

Medical Air attempted to obtain the defendants' permission to issue additional stock in the hope that increased funding would allow it to expand its production capacity to take advantage of some inchoate sales opportunities. The defendants opposed this plan, fearing it would dilute their interest in the company. Medical Air then presented the defendants with the possibility of a buy-out by an outside investor, but the defendants were not interested.

Instead, between July 8 and August 15, 1996, the defendants sent three separate notices of default to Medical Air and threatened litigation. Efforts were made to restructure the business, but these were unsuccessful. In the August 15 notice, Marwan Investment exercised its right to demand acceleration of the loan and, the following month, Marwani Holding requested that Medical Air redeem its

stock. In response, Medical Air began to look for a new investor to buy out the defendants. During this time, the defendants chose not to exercise their security rights against Medical Air, waiting to see if Medical Air could secure new funding. The parties agree that, by the fall of 1996, Medical Air was out of money to fill orders and, to put it mildly, not doing well.

A company called Nortek, Inc., expressed some interest in a merger with Medical Air. On November 8, 1996, Nortek and Medical Air signed a non-binding letter of intent, which proposed that Medical Air's shareholders would receive 500,000 shares of Nortek common stock, worth about seven to ten million dollars. Nortek reserved decision on a final purchase price for Medical Air until it saw whether Medical Air could meet its sales projections for the fourth quarter of 1996. Medical Air quickly scheduled a shareholders' meeting for January 8, 1997. Notices of the meeting and proxy were sent to Medical Air shareholders on December 19, 1996.

On November 19, after receiving Nortek's letter of intent, Rahbany requested from Medical Air the due diligence material provided to Nortek. Under the Investment and Shareholders Agreement, Marwani was entitled to receive any reasonably requested information within five business days. Rahbany says he was particularly interested in any financial forecasts Medical Air had made, because he wanted to assess whether Nortek's interest in Medical Air had a realistic basis. This concern was not unfounded; at trial, Medical Air's financial adviser testified that he warned Medical Air that, once Nortek had seen the due diligence materials, it would attempt to negotiate a lower purchase price.

Rahbany says he repeatedly requested the information over two months, but never received copies of what had been provided to Nortek. Medical Air, in turn, was "reluctant to produce the documents because" corporate officials felt that the defendants were "going fishing" for evidence for their

litigation in the default suit. Medical Air also asked the defendants to identify the specific items they wanted, and the reasons for each. The defendants refused, and reiterated their request for all the due diligence documents. At Medical Air's request, the defendants signed a non-disclosure agreement, agreeing not to disclose any information about the proposed merger.

Medical Air says that it supplied Rahbany with the information that it judged to be necessary for Rahbany's review of the proposed deal, including a listing of the due diligence materials (but not the materials themselves). Medical Air's CEO testified that he did not recall if he ever supplied the defendants with the fourth quarter sales projections provided to Nortek. Medical Air's financial adviser who worked on the merger deal testified that he never provided the defendants with the due diligence materials.

On December 31, 1996, Medical Air sent a draft merger agreement and certain other draft documents to shareholders for review. The defendants say that they were not able to assess the deal in part because the terms, including the purchase price, had not been finalized at that time. According to the Medical Air attorney who worked on the deal, merger terms are never final until the closing, and it is customary for shareholder votes to take place before the merger documents are finalized. The defendants also say that they were unable to assess the viability of the deal because Medical Air's fourth quarter financial results were not yet available. The defendants had certain other problems with the draft documents: the draft merger agreement stated that Marwan Investment's loan would be repaid at the original interest rate, rather than the default interest rate triggered by Medical Air's May 1996 default (a difference of less than $25,000); the shares that Marwani Holding would receive in the proposed merger would not be immediately saleable; and a portion of the shares would be subject to loss if the warranties that Medical Air made in the merger proved

to be false. Finally, the draft merger failed to give Marwani Holding preferred shareholder rights, although Medical Air's amended Articles of Organization stated that any merger would make "appropriate provisions" to provide the same privileges to preferred stockholders "as nearly as may be, with respect to any shares of stock or securities" received in a merger.

Five days before the scheduled vote, the parties met to discuss the proposed merger. At that meeting, the defendants asked for five pieces of information: a statement from Nortek that due diligence was satisfactory; a patent assignment release; an explanation of how the default loan interest rate would be dealt with; a copy of the November financial statements; and a valuation of the company. Medical Air says it provided the November financial statements, and a valuation of the defendants' stock under the proposed merger plan (between $1.4 and $1.8 million) to the defendants' counsel on the following day. Rahbany says he was not given sufficient information to determine if that valuation was a credible number, and says that he never received the November financial statements. At that time, the December financial statements were not yet ready. Rahbany admitted at trial that he never reviewed the public records of Nortek to try to assess the basis for Nortek's interest in Medical Air.

Medical Air failed to meet its fourth quarter 1996 projections; it had projected sales of $750,000 for the quarter, but realized only $236,000. Medical Air blames this failure on its problems with the defendants, which it said were distracting its principal officers from business and demoralizing its sales force.

A day or two before the vote, Medical Air's president, Frank Paradise, was told by an associate of his that Marwani planned to vote against the deal. Medical Air says that, as a result of learning that Marwani intended to vote against the deal, it reopened negotiations with Nortek on the day before

the scheduled vote. The memory of Nortek's representative was that the negotiations were reopened because Medical Air had failed to meet its fourth quarter projections.

At the January 8 vote, Marwani Holding voted against the merger. All other shareholders voted for the merger. Marwani Holding, holding almost 15% of the shares, was able to single-handedly defeat the merger because Nortek, as part of the proposed merger agreement, had required a minimum of 95% stockholder agreement. Still, the terms of the Investment and Stockholders Agreement appeared to allow Medical Air to proceed with a merger without the defendants' approval if the Medical Air Board of Directors certified that the purchase price met a certain "qualifying price" defined in the Agreement. This was never done.[1]

Rahbany testified that he voted against the merger because

> I wanted at the same time to know how viable, to find the basis, because I had a fiduciary responsibility to cast a vote, and I had to have a reasonable basis for my action. And when you don't know what you're doing, you don't do anything.

He also testified that he voted against the deal because he did not think that the deal was viable. He admitted that one of the purposes of his vote was to advance the purposes of Marwan Investment, but stated that he "had in mind the multiple entities that [he] represented all the time and also the separateness all the time." After the shareholders' meeting, Marwani's attorney, who tendered the proxy vote,

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1 Rahbany testified that one of the reasons justifying his suspicions of the deal was Medical Air's failure to certify the purchase price, although he did not voice that suspicion to Medical Air at the time.

told Medical Air's attorney that the Medical Air principals would make a lot of money from the proposed merger, while Rahbany was coming up short.

Medical Air and Nortek continued negotiations, and later in January 1997 Nortek signed a second letter of intent offering 250,000 shares, while providing that the purchase price would not exceed $6.25 million. The defendants, for their part, continued to request more information. The merger ultimately did not go through, and Medical Air blames this on the legal problems caused by the defendants. Medical Air does not argue, however, that the defendants violated any fiduciary duty with respect to their actions following the January 8 vote.

II.

In April 1997, Medical Air filed a diversity suit in the District of Massachusetts, seeking a declaration that it was not in default to the defendants, an injunction against the sale of its assets, and damages for breach of contract, negligence and other claims based on Marwani Holding's vote against the merger. On January 26, 1998, the district court found that, as of May 1996, Medical Air was in default of its responsibilities under the Investment and Stockholders Agreement, and permitted Marwan Investment to sell Medical Air's assets. Medical Air Tech. Corp. v. Marwan Inv., Inc., No. 97-10764-JLT (D. Mass. Jan. 26, 1998). Medical Air does not appeal this judgment.

The defendants did not immediately enforce their security rights against Medical Air; they say they were waiting to see if Medical Air could find a way to pull itself out of its financial hole. In August 1998, Marwan Investment began foreclosure proceedings against Medical Air. At public auction in November 1998, Marwan Investment bought all of Medical Air's remaining assets with a credit bid of $150,000. Marwan says Medical Air still owed a debt of $1,015,236 to Marwan on the 1996 loan. The defendants then moved for

a dismissal of Medical Air's case, arguing that their foreclosure purchase had included Medical Air's rights in this case. The district court denied that motion on June 22, 1999. It also denied a motion by Medical Air's shareholders to intervene.

On August 10, 2000, the defendants filed a motion to strike Medical Air's jury demand. On January 12, 2001, the court heard argument on the jury waiver issue. Medical Air's counsel argued that when Medical Air signed the Security Agreement it did not understand that it was waiving jury trial, but he conceded that the Security Agreement effected a valid waiver of the right to jury with respect to Marwan Investment. Nonetheless, he argued that Medical Air had not waived jury trial for any of the other defendants. The district court judge expressed concern about the feasibility of having a bench trial for one defendant and a simultaneous jury trial for the others. The defendants argued that the plaintiff had presented a claim under Mass. Gen. L. ch. 93A, which could not be considered by a jury, and so the judge "would have to make findings that would be the mirror findings of" the jury findings. The court did not conduct an evidentiary hearing (none had been requested), but both parties had submitted affidavits. The court allowed the motion to strike the jury demand without issuing a written order explaining the basis for its decision. However, it appears that the trial judge believed that, in a case arising out of a single transaction and presenting claims against multiple defendants, a waiver against one was a waiver against all.[2]

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[2] The court initially noted, "If I understand correctly, regardless of whether you think -- you talk in terms of integrated documents or anything else, it is very, very clear that the plaintiff waived jury; is that right?" Medical Air's counsel responded by arguing that the only waiver was in the Security Agreement, and it applied only to Marwan Investment. The judge then said:

After the court ruled on the defendants' summary judgment motion, three of Medical Air's claims remained for trial: 1) breach of contract and of the implied covenant of good faith and fair dealing as to MFH and Marwani Holding; 2) breach of fiduciary duty as to Marwani Holding; and 3) tortious interference with contractual and business relations as to all the defendants.

At the conclusion of the four day bench trial, the district court ruled for the defendants on each of Medical Air's remaining claims and entered judgment in the amount of $1,015,236, plus post-trial interest, for Marwan Investment on its counterclaim based on Medical Air's default of the Investment Agreement. It also ruled for the plaintiffs on the defendants' good faith counterclaim. Med. Air Tech. Corp. v. Marwan Inv., Inc., No. 97-10764-JLT (D. Mass. Aug. 21, 2001).

III.

On appeal to this court, Medical Air primarily challenges two of the district court's rulings: its order dismissing the jury demand, and its ruling that Marwani Holding was not in breach of its fiduciary duty as a stockholder. The defendants defend the court's rulings on

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> But you did waive. With respect to this case, you waived jury.
>
> . . .
>
> Do you know of any precedent where you can waive with respect to one defendant and not with respect to another? I have never tried a case like that. I would not know how to preside. . . . I am just talking about within the cast, the traditional cast, of a transaction, one plaintiff, four people, some actual signatory, some by inference, perhaps, but the plaintiff says, I waive jury. Doesn't that count for everything?

the grounds given by the district court. They also argue, in the alternative, that the district court's judgment should be upheld because Marwan Investment became the assignee of Medical Air's right to pursue this case when it bought all Medical Air's assets in foreclosure.

A. Jury Trial

Medical Air argues that the trial judge erred in granting the defendants' motion to strike Medical Air's jury demand as to its claims against Dr. Rahbany, MFH, and Marwani Holding, because only Marwan Investment was party to the Security Agreement which contained the jury waiver.

The confusion on this issue evident in the record leads us to review basic principles. There is a presumption against denying a jury trial based on waiver, and waivers must be strictly construed.[3] Aetna Ins. Co. v. Kennedy ex rel. Bogash, 301 U.S. 389, 393 (1937) ("[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."); Paracor Fin., Inc. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1166 n.21 (9th Cir. 1996). In a diversity jurisdiction suit, the enforcement of a jury waiver is

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[3] The circuits are currently split on the question of which party bears the burden of proof as to whether a contractual jury trial waiver was knowing and voluntary. See Pierce v. Atchison Topeka & Santa Fe Ry. Co., 110 F.3d 431, 435 n.4 (7th Cir. 1997) (collecting cases); Hulsey v. West, 966 F.2d 579, 581 (10th Cir. 1992). We have not yet ruled on this point, although a district court within this circuit has held that the party seeking to enforce the waiver bears the burden. See Luis Acosta, Inc. v. Citibank, N.A., 920 F. Supp. 15, 18 (D.P.R. 1996). In the analogous situation of a release of claims against an employer, we have held that the party seeking to enforce the release bears the burden of proof. See Melanson v. Browning-Ferris Indus., 281 F.3d 272, 276 (1st Cir. 2002). We need not resolve the issue here.

a question of federal, not state, law. See Simler v. Conner, 372 U.S. 221, 222 (1963).

In general, a contractual waiver binds only the parties who sign the contract. See EEOC v. Waffle House, Inc., 122 S. Ct. 754, 764 (2002) ("It goes without saying that a contract cannot bind a nonparty."). In Waffle House, the Supreme Court held that the EEOC was not bound by an employer-employee contractual arbitration agreement, reasoning that "[a]bsent some ambiguity in the agreement, . . . it is the language of the contract that defines the scope of disputes subject to arbitration," and therefore even the federal policy favoring arbitration does not "authorize[] a court to compel arbitration . . . by any parties . . . that are not already covered in the agreement." Id. at 762.

There are some exceptions to this rule. For instance, some courts have applied a theory of equitable estoppel for suits against non-signatories arising out of the contract itself, reasoning that the party seeking the benefit of a contract could not refuse to be bound by a clause contained within it. E.g., Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 527-31 (5th Cir.), cert. denied, 531 U.S. 1013 (2000); MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947-48 (11th Cir. 1999); Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp., 659 F.2d 836, 841 & n.9 (7th Cir. 1981).

In general, though, we look to the plain language of the contract's jury waiver to determine whether it unambiguously covers the claims asserted. In cases where the contractual language is ambiguous, simultaneously executed documents may be relevant as a matter of contractual interpretation. In Massachusetts, "if the parties execute two or more documents, with a manifested intent that the documents together express their entire agreement, a court reads the documents together, rather than construing each as if it stood alone." Donoghue v. IBC USA (Publ'ns), Inc., 70 F.3d 206, 212 (1st Cir. 1995); see also FDIC v. Singh, 977 F.2d 18, 21-22 (1st Cir. 1992); Chase Comm. Corp. v.

Owen, 32 Mass. App. Ct. 248, 588 N.E.2d 705, 707 (1992); cf. Paracor Fin., 96 F.3d at 1165 (holding that this is "a principle of interpretation [which] does not mean that contemporaneously executed documents somehow become a single unified contract binding all signatories to all provisions").

Even once it is determined that a contractual jury waiver clause does encompass the asserted claims, courts will not enforce the jury waiver unless it was entered into knowingly and voluntarily. See Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1563 (Fed. Cir. 1990); Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837 (10th Cir. 1988) (jury waiver may not be fraudulently induced); K.M.C. Co. v. Irving Tr. Co., 757 F.2d 752, 755-56 (6th Cir. 1985). In cases such as this, where the jury waiver was part of a separate contract, signed only by certain parties to the larger transaction, non-signatory parties seeking enforcement of the waiver may have a more difficult task in showing that the waiver was voluntary and knowing. This is, however, a fact-based inquiry.[4] See Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 182 (1st Cir. 1995).

Medical Air has conceded that it made a valid jury waiver with regards to all claims against Marwan Investment. The record is sparse as to the basis for the trial court's ruling.

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[4] In analogous situations we have looked to the "totality of the circumstances," including factors such as the waiving party's education and business experience, the respective roles of the parties in determining the terms of the waiver, the clarity of the agreement, the amount of time the waiving party had to consider the waiver, whether the waiving party was represented by counsel, and the consideration offered for the waiver, to determine if the waiver was knowing and voluntary. Melanson, 281 F.3d at 276 & n.4 (waiver of Title VII rights through release of claims against employer); Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 181-82 (1st Cir. 1995) (waiver of ERISA pension benefits).

We do not, though, need to decide the issue. As we hold below, no reasonable jury could find liability for breach of fiduciary duty against Marwani Holding nor a causal link between Marwani Holding's vote at the January 8 board meeting and the failure of the proposed merger with Nortek.

Because the core ruling is correct and none of Medical Air's claims could survive a motion for judgment as a matter of law, the jury waiver question is no longer viable. See Segrets v. Gillman Knitwear Co., 207 F.3d 56, 64 (1st Cir. 2000); In re N-500L Cases, 691 F.3d 15, 25 (1st Cir. 1982). See generally 9 C. Wright & A. Miller, Federal Practice and Procedure § 2322 n.6 (2d ed. 1995 & Supp. 2002) (collecting cases).

B. Fiduciary Duty

1. Alleged Breach of Duty

Under Massachusetts law, shareholders in a close corporation owe a fiduciary duty of "utmost good faith and loyalty." Zimmerman v. Bogoff, 402 Mass. 650, 524 N.E.2d 849, 853 (1988) (quoting Donahue v. Rodd Electrotype Co. of New England, 367 Mass. 578, 328 N.E.2d 505, 515 (1975)) (internal quotation marks omitted). This is a higher standard than a simple "good faith and inherent fairness" standard. Donahue, 328 N.E.2d at 515-16. The Massachusetts Supreme Judicial Court (SJC) has articulated a two-part test for determining if this fiduciary duty has been violated. First, the defendant must show a legitimate business purpose for its action that allegedly is a breach. If the defendant makes such a showing, the burden shifts to the plaintiff to show that "the proffered legitimate objective could have been achieved through a less harmful, reasonably practicable, alternative mode of action." Zimmerman, 524 N.E.2d at 853. Then the court "must weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative." Wilkes v. Springside Nursing Home,

370 Mass. 842, 353 N.E.2d 657, 663 (1976). In applying this test, courts must be sure not to "unduly hamper . . . effectiveness in managing the corporation in the best interests of all concerned." Id. Moreover, "mere errors of judgment" do not constitute a fiduciary breach. Spiegel v. Beacon Participations, 297 Mass. 398, 8 N.E.2d 895, 904 (1937).

Donahue itself involved an attempt by majority stockholders to freeze out minority shareholders. 328 N.E.2d at 509-11. See generally Peter M. Rosenblum, Corporate Fiduciary Duties in Massachusetts and Delaware, in How to Incorporate and Counsel a Business (Massachusetts Continuing Legal Education, Inc. 1999). By contrast, this case involves actions by 15% minority shareholders. Massachusetts law is clear that minority shareholders in close corporations also have fiduciary responsibilities. See A.W. Chesterton Co. v. Chesterton, 128 F.3d 1, 5-6 (1st Cir. 1997); Zimmerman, 524 N.E.2d at 853; Donahue, 328 N.E.2d at 517; Smith v. Atl. Props., Inc., 12 Mass. App. Ct. 201, 422 N.E.2d 798, 801-02 (1981). Chesterton and Smith involved situations in which unilateral action by minority shareholders would result in dire tax consequences to the majority shareholders. See A.W. Chesterton Co., 128 F.3d at 3; Smith, 422 N.E.2d at 800. Further, because the financial obligations were owed to the government, there was no market mechanism to determine the consequences of the action. In that sense, the minority shareholders had effective control over one aspect of corporate finances. Here, by contrast, the defendants did not inherently have effective control. Their 15% was needed only because the outside purchasers set as a condition of sale that 95% of the shareholders approve the merger. The Donahue rule itself involves a balancing of legitimate interests, and the scope of the duties owed may depend, in part, on context. See Zimmerman, 524 N.E.2d at 853 ("[T]he Donahue remedy is not intended to place a strait jacket on legitimate corporate activity.")

The district court here found that "[l]acking th[e] information [concerning the basis for the merger, the final terms of the merger, or the price that would be paid], Marwani certainly had a legitimate business reason for voting against the merger" and, further, that Medical Air's refusal to provide the requested information "left Marwani with no choice but to vote against merger." The district court then found that the only alternative advanced by Medical Air was for Marwani simply to vote for the Nortek merger, an alternative that totally failed to address the problems with the deal itself. This showing does not meet the plaintiff's burden.

Medical Air argues that the district judge improperly construed the Massachusetts law governing fiduciary duty in closely held relationships by holding that Marwani Holding's own business interests could be a proper motivating factor for the vote. It argues that Marwani's vote against the merger was not motivated by legitimate business interests, saying that the vote was really motivated by the defendants' own self-interest -- specifically, that Marwani wanted more of the proceeds of the merger to go to Marwan, rather than the Medical Air principals. It says that Marwani's vote against the merger was intended to pave the way for Marwan's foreclosure of Medical Air's assets, given that Medical Air's financial situation was so desperate in January 1997 that the merger was the only way to salvage the business. Medical Air relies heavily on Rahbany's testimony admitting that he did take Marwan Investment's and Marwani Holding's interests into consideration in his decision. It also relies on the statement that Marwani Holding's counsel allegedly made after the January 8 vote, complaining that Rahbany would not make enough money out of the proposed deal.

Medical Air mischaracterizes the trial court's holding. The trial court held that Marwani Holding had a legitimate purpose in voting against the merger when it had not been

provided material information about the merger and perceived a risk that the proposed merger was made of gossamer. That legitimate purpose is not negated if Marwani Holding's vote also coincided with its self-interest.

We reject Medical Air's argument that a minority shareholder may never, under the Donahue rule, take its own interest into account in deciding its vote. Such an argument is both unrealistic and too biased. The SJC has observed that stockholders in a close corporation "may not act out of avarice, expediency, or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation." Blank v. Chelmsford OB/Gyn, P.C., 420 Mass. 404, 649 N.E.2d 1102, 1105 (1995) (emphasis added); see also Donahue, 328 N.E.2d at 515 (using same language). But self-interest may be a proper motive for a stockholder's actions, so long as that interest does not result in acts in derogation of the stockholder's fiduciary duty. The SJC has held that majority stockholders "have certain rights to what has been termed 'selfish ownership' in the corporation which should be balanced against the concept of their fiduciary obligation." Wilkes, 353 N.E.2d at 663. We think that principle extends, at least in part, to minority stockholders, although their interests are somewhat different in character. See A.W. Chesterton Co., 128 F.3d at 7 (noting that minority stockholders may control some aspects of a corporation but not others). Admittedly, there may be tensions between the two types of interests -- loyalty to the corporation and selfish ownership. Difficult cases will arise where the dividing line is not clear. This is not one of those cases.

The district court correctly found that Marwani Holding had shown a legitimate business rationale for the vote against the merger. To begin with, Marwani Holding did lack material information about the proposed merger and Medical Air had failed to provide Marwani Holding with the requested due diligence materials. Marwani Holding also had a suspicion, reasonable in context, that the deal was

based on unrealistic assumptions that would ultimately doom it, and that it served only as a distraction from the real problems facing Medical Air. This suspicion was well-founded; Medical Air's CEO admitted at trial that the fourth quarter sales estimates for 1996 provided to Nortek were above what Medical Air had ever accomplished before and far exceeded its actual fourth quarter sales results. These reasons more than suffice to show a legitimate business reason for Marwani's vote.

Upon this showing, the burden shifted to Medical Air to show that there was "a less harmful, reasonably practicable, alternative mode of action" other than the vote against the merger. Medical Air has not made any such showing. The district court found that Medical Air's proposed alternative -- that Marwani could have simply voted for the merger -- is not a reasonable and practicable alternative, given Marwani's legitimate concerns about what form the deal would ultimately take, or whether the whole deal was simply a chimera. Its finding was compelled by the evidence.

2. Causation

The defendants argue in the alternative that, even if Marwani Holding had violated a fiduciary duty in voting against the merger, it was not the cause of the merger's failure. We agree. Nortek's CEO testified at trial (through deposition) that after Nortek saw the fourth quarter sales results, it decided that it should pay less than was offered in the original letter of intent and reopened negotiations with Medical Air. The renegotiated offer from Nortek, as expressed in the second letter of intent, provided only half what was offered in the deal before the Board at the January 8 vote. It is clear that Nortek was not willing to go through with the terms of the earlier proposed merger put before the Board that Marwani voted against. Even if Marwani Holding had voted for the proposed merger, it would have made no

difference. Medical Air still would have been in the same position as it was after the January 8 vote, negotiating new terms with Nortek. No reasonable jury could find that Marwani Holding's vote was the proximate cause of the demise of the proposed Nortek merger.

C. Other Claims

The plaintiff's other claims are similarly lacking in merit. The remaining questions decided by the district court in the bench trial were: a claim against MFH for breach of the consulting agreement; a breach of the implied covenant of good faith and fair dealing against Marwani Holding based on its vote against the Nortek merger; and tortious interference with contractual relations against Rahbany, MFH, and Marwani Holding for their actions with regard to the Nortek merger.[5] The latter two claims must fail, for the same reasons that the fiduciary duty claim against Marwan Holding fails. Neither Rahbany nor MFH took any actions with regards to the Nortek deal that were separate from the actions taken by Marwan Holding, discussed above. Medical Air has not presented any evidence to indicate that these actions, rather than Medical Air's inability to meet fourth quarter sales projections, caused the proposed merger before the Board on January 8 to fail. Without causation, there can be no claim for tortious interference, see United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 551 N.E.2d 20, 21 (1990), or for a breach of the implied covenant of good faith and fair dealing, see Druker v. Roland Wm. Jutras Assocs., 370 Mass. 383, 348 N.E.2d 763, 765 (1976) ("'[I]n every contract there is an implied covenant [of good faith and fair

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[5] Medical Air did not appeal the merits of the district court's rulings on these claims. We consider the question only for the purpose of Medical Air's appeal of the denial of a jury trial on all of its claims against MFH, Rahbany and Marwani Holding.

dealing] that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . .'") (quoting Uproar Co. v. Nat'l Broad. Co., 81 F.2d 373, 377 (1st Cir. 1936)); MacGillivary v. W. Dana Bartlett Ins. Agency of Lexington, Inc., 14 Mass. App. Ct. 52, 436 N.E.2d 964, 967 (1982).

That leaves only Medical Air's claim that MFH violated its contractual obligations under the consulting agreement. The district court outlined the alleged claim well in its opinion. The consulting agreement required MFH to provide "financial and strategic corporate planning services" to Medical Air "including, by way of example: (i) assisting [Medical Air] in attracting a new senior leader; (ii) evaluating and helping source transactions such as acquisitions, joint ventures and public offerings; and (iii) assisting [Medical Air] in developing financial and operating reporting systems." Medical Air's CEO, Stephen Hague, testified that MFH did nothing to help attract a new lender or to develop financial and operating reporting systems. However, Hague also testified that he met on a monthly basis for a few hours with the consultant provided by MFH, as well as speaking with him on the phone for a few hours each month. During these meetings, the consultant reviewed the operation of the company and proposals for the company. According to Hague, the consultant encouraged Medical Air to expand its sales force rapidly; assisted in putting together an expansion plan; recommended and outlined the creation of a business advisory board; and investigated at least one possible acquisition. The consultant also occasionally interviewed or spoke with sales representatives. In addition, Medical Air did effect changes in its accounting procedures during this time period; the consultant was copied on the relevant documents, but the record is not clear as to what his level of participation was.

In August 1996, the consultant who had been working with Medical Air ceased to work for MFH. In September,

Medical Air stopped paying the $4,000 per month consultancy fee. In October 1996, Medical Air met with a new individual that MFH had appointed to replace the previous consultant, but that was the last service provided under the consultancy agreement. At this point, Medical Air was already in default of its obligations under the Investment and Stockholders Agreement.[6]

Based on the information provided by Medical Air's CEO, we doubt that Medical Air has presented enough evidence on this claim for it to go to a jury. It is undisputed that the MFH consultant worked with Medical Air throughout the relevant time period and provided input on the business's development. As the district court noted, the fact that the MFH consultant did not achieve all of the goals laid out "by way of example" in the consulting agreement did not constitute breach, given how quickly the entire relationship disintegrated and the agreement's lack of any time frame for achieving these goals.

Regardless of the strength of the claim, however, the claim is no longer Medical Air's to make. Marwan Investment purchased all the assets of Medical Air at the foreclosure sale in November 1998. The description of assets included "all rights, claims, counterclaims, crossclaims, demands, recoveries and defenses in connection with or asserted or which may be asserted by Medical Air in that certain litigation styled Medical Air Technology Corporation v. Marwan Investment . . . pending in the United States District Court for the District of Massachusetts." Under Massachusetts law, claims for breach of contract are

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[6] Medical Air did not argue that MFH's breach was based on the failure to provide ongoing consultancy services after September 1996.

generally assignable.[7] Raymer v. Bay State Nat'l Bank, 384 Mass. 310, 424 N.E.2d 515, 518 (1981); see also SAPC, Inc. v. Lotus Dev. Corp., 921 F.2d 360 (1st Cir. 1990). Although there may be cases in which public policy concerns merit the creation of an exception to that rule when the claim has been involuntarily assigned through a foreclosure sale, this is not such a case. If the claim for breach of the consulting agreement constituted a defense to the defendants' claim of default, or if it would have saved Medical Air as an ongoing concern, than Medical Air should have raised this as a defense to the defendants' summary judgment motion on the default claim. Medical Air did not do so, nor did it raise any contemporaneous objection to the inclusion of its rights in this matter in the assets foreclosure sale.

Conclusion

The district court's decision is affirmed. No costs are awarded.

s/_____
Sandra L. Lynch
First Circuit Judge

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[7] The defendants have argued that all of Medical Air's claims are assignable, whether or not they sound in contract. We need not decide this point, as we have disposed of Medical Air's other claims on other grounds.

United States Court of Appeals
For the First Circuit

No. 01-2348

MEDICAL AIR TECHNOLOGY CORPORATION,

Plaintiff, Appellant,

v.

MARWAN INVESTMENT, INC.; MARWANI HOLDING COMPANY, N.V.; MULTIFINANCE HOLDING CORPORATION; AND DR. K. PHILIP RAHBANY,

Defendants, Appellees.

ERRATA SHEET

The opinion of this court, issued August 14, 2002, should be amended as follows:

page 8, line 4:	delete "," after "statements"
page 13, line 2:	replace "plaintiffs" with "plaintiff"
page 24, line 17:	replace "leader" with "lender"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MEDICAL AIR TECHNOLOGY CORPORATION	)Civil Action)#97-10764-) JLT
Plaintiff	)
v.	)
MARWAN INVESTMENT, INC., MARWANI HOLDING COMPANY, N.V., MULTIFINANCE HOLDING CORPORATION AND DR. K. PHILLIP RAHBANY	)
Defendants	)

ORDER

August 21, 2001

TAURO, J.,

The court hereby orders that:

(1) Judgment is entered for Marwani on Plaintiff's breach of fiduciary duty claim;

(2) Judgment is entered for Multifinance Holding Co. on Plaintiff's breach of contract claim;

(3) Judgment is entered for Marwani on Plaintiff's breach of the implied covenant of good faith and fair dealing claim;

(4) Judgment is entered for all Defendants on Plaintiff's tortious interference claim;

(5) Judgment is entered in the amount of $1,015,236, plus interest accrued since Trial, for Marwan on its counterclaims for action of the note and breach of contract;

(6) Judgment is entered for Plaintiff on Marwan and Marwani's counterclaim for breach of the implied covenant of good faith and fair dealing; and

(7) Judgment is entered for Marwan and Marwani on their counterclaim for declaratory judgment.

IT IS SO ORDERED.

/s/_____
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MEDICAL AIR TECHNOLOGY, CORP.,
Plaintiff

V.

CIVIL ACTION
NO. 97-10764-JLT

MARWAN INVESTMENT, INC.,
MARWANI HOLDING COMPANY, N.V.
AND DR. K. PHILLIP RAHBANY
Defendants

JUDGMENT

TAURO, D.J.

In accordance with the Court's Memorandum and Order dated August 21, 2001 in the above-entitled action, it is hereby ORDERED:

Judgment for Defendant, Marwani on Plaintiff's breach of fiduciary duty;

Judgment for Defendant, Multi-finance Holding Co., on Plaintiff's breach of contract claim; Judgment for Defendant, Marwan on Plaintiff's beach of the implied covenant of good faith and fair dealing claim; Judgment for all of the Defendants on Plaintiff's tortious interference claim; Judgment for Defendant, Marwan in the amount of $1,015,326, plus interest since Trial on its counterclaims for action of the note and breach of contract; Judgment for Plaintiff on Marwan and Marwani's counterclaim for breach of implied covenant of good faith and fair dealing; and Judgment for Defendants, Marwan and Marwani on their counterclaim for declaratory judgment.

By the Court,

August 22, 2001
Date

/s/_____
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MEDICAL AIR TECHNOLOGY, CORP., Plaintiff,	*	Civil Action No. 97-10764-JLT
v.	*	
MARWAN INVESTMENT, INC.; MARWANI HOLDING CO., N.V.; MULTIFINANCE HOLDING CORP.; and K. PHILIP RAHBANY, Defendants.	*	

MEMORANDUM

August 21, 2001

TAURO, J.,—

Plaintiff Medical Air Technology Corp. ("Medical Air") sues Defendants Marwan Investment, Inc. ("Marwan"); Marwani Holding Co., N.V. ("Marwani"); Multifinance Holding Corp. ("MHC"); and Dr. K. Philip Rahbany. Medical Air alleges that Marwani breached its fiduciary duty; MHC breached its contract; Marwani breached the implied covenant of good faith and fair dealing; and all Defendants tortiously interfered with contractual relations. Marwan and Marwani counterclaim for action on a note, breach of contract, breach of the implied covenant of good faith and fair dealing, and for a declaratory judgment that rights under the contract are enforceable. The court conducted a bench trial and makes the following findings of fact and conclusions

of law.

FINDINGS OF FACT

Medical Air is a closely-held corporation that manufactures air-purification equipment for controlling the spread of tuberculosis.[1] Stephen Hague was the company's chief executive officer[2] Frank Paradise was the company's president.[3]

In 1995, Medical Air began seeking sources of investment.[4] After an unsuccessful attempt to raise funds through an initial public offering, Medical Air sought a "venture-type investor."[5] Medical Air's counsel introduced the company to MHC, the assets manager of Multifinance Investment & Holding ("MFIH"); and to Marwan and Marwani, holding companies for investments made by or on behalf of MFIH.[6] Defendant Rahbany is the President and sole director of MHC, and Marwan and Marwani's agent.

With MHC's approval,[7] Marwan and Marwani entered into an Investment and Stockholders Agreement ("ISA") with Medical Air, Hague, and Paradise, whereby Marwan loaned Medical Air $625,000 and Marwani invested $750,000 in exchange for 15,000 shares of Medical Air's convertible

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[1] (Tr. Vol. I at 68:16-18.)

[2] (Tr. Vol. I at 79:5.)

[3] (Tr. Vol. I at 79:14.)

[4] (Tr. Vol. I at 78:13-21.)

[5] (Tr. Vol. I at 78:13-21.)

[6] (Tr. Vol. I at 80:3-5.)

[7] (Tr. Vol. IIA at 91:11-15.)

redeemable preferred stock.[8]

The ISA contained three provisions particularly relevant to this litigation. The information-request provision required Medical Air to provide Marwan and Marwani with any reasonably requested information within five business days of the request.[9]

The merger provision stated that if Medical Air sought to merge with another company, Marwani's shareholder vote would be unnecessary if Medical Air's Board of Directors certified in writing that the consideration for the merger was a "Qualifying Price," as defined in the ISA.[10] Section 5.3 of the ISA provided that Medical Air "may merge with or into or consolidate with or sell substantially all of its assets to another entity if...the value of the consideration received in respect to each share of Medical's Common Stock equals or exceeds the Qualifying Price."

The ISA also contained a default provision, stating that Medical Air would default if it failed to maintain a specified minimum "Consolidated Net Worth"[11] or to maintain a minimum "Consolidated Net Working Capital[12]."[13] In the event of default, two things could occur. First, under the ISA, Marwan could accelerate the loan, and all principal and

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[8] (Trial Ex. 6.)

[9] (Trial Ex. 6 @ § 4.5(d).)

[10] (Id. at § 5.3.)

[11] (Id. at § 4.8.)

[12] (Id. at § 4.9.)

[13] (Id. at § 11.1.)

interest would be immediately payable.[14] Second, according to Medical Air's Articles of Incorporation, Marwani could immediately seek to redeem its preferred stock.[15] Medical Air had six months to comply.[16] If Medical Air failed to redeem within the six-month period, Medical Air's Board of Directors would double in size and increase by one.[17] Marwani could then elect a majority of the new board members.[18]

Securing the needed capital solved one problem, but Medical Air also required financial and management expertise.[19] The company turned to MHC, with whom it entered a Consulting Agreement.[20] For $4000/month, MHC agreed to act as Medical Air's financial consultant.[21] MHC designated one of its vice presidents, John Flaherty, to act as Medical Air's primary consultant, a position Flaherty served in from January to August 1996.[22]

In May 1996, Medical Air failed to meet the minimum Net Worth and Net Working Capital requirements established in the ISA, thus placing the company in default. On July 8,

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[14] (Id. at § 11.1(g).)

[15] (Trial Ex. 4 at § 6(a)(ii).)

[16] (Id. at § 6(b).)

[17] (Trial Ex. 4 at § 6(b).)

[18] (Id.)

[19] (Tr. Vol. I at 77:2-8.)

[20] (Id. at 90:5-6.)

[21] (Trial Ex. 11 at § 4(a).)

[22] (Id. at § 3; Tr. Vol. IIA at 116:10-118:9.)

1996, Flaherty, acting on Marwan and Marwani's behalf, notified Medical Air of the default and reserved all rights under the ISA.[23]

On July 15, 1996, after working with Flaherty, Medical Air's Board of Directors adopted an operating plan to cut costs by, among others, reducing the monthly operating budget. On August 15, 1996, despite the company's efforts, Marwan exercised its right to accelerate the loan, in accordance with the ISA,[24] and on September 3, 1996, Marwani requested that Medical Air redeem the preferred stock, as permitted under the Articles of Incorporation.[25]

Realizing the impact of these actions, Medical Air sought to "take out" Marwan and Marwani.[26] Medical Air retained Joseph Finn, a certified public accountant and shareholder, to identify businesses or individuals potentially interested in purchasing the company.[27] Finn sent a mass mailing to 800 prospective purchasers.[28] Jerold Lavine responded to Finn's letter and contacted Richard Bready, the Chairman and CEO of Nortek, Inc.[29] - - a building-products manufacturer with a subsidiary in the medical-air-quality

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[23] (Trial Ex. 25.)

[24] (Trial Ex. 27.)

[25] (Trial Ex. 30.)

[26] (Tr. Vol. IV at 25:7-13.)

[27] (Trial Ex. 28.)

[28] (Tr. Vol. IIA at 41:19-42:8.)

[29] (Id. at 42:25-43:5.)

business.[30]

Bready expressed interest in Nortek acquiring Medical Air, and on November 8, 1996, the two companies executed a Letter of Intent for their proposed merger.[31] The Letter set a closing date of no later than January 15, 1997.[32] The Letter of Intent stated that Medical Air's shareholders would receive 500,000 shares of Nortek common stock.[33] Based upon the then current trading price, the consideration for the proposed merger was approximately $7 million.[34] This price was based on Medical Air's financial projections. But the Letter of Intent stated that Nortek's commitment was "subject to its satisfaction with the results of its review of [Medical Air's] business affairs."[35]

On November 7, 1996, Medical Air delivered due-diligence materials to Nortek.[36] On November 19, 1996, counsel for Marwan, Marwani, and MHC sent a letter to Medical Air, requesting the due-diligence materials supplied to Nortek.[37] At Medical Air's request, Defendants signed a non-disclosure agreement, agreeing not to disclose any

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[30] (Tr. Vol. IV at 18:16-19:8.)

[31] (Trial Ex. 36.)

[32] (Id. at ¶ 3.)

[33] (Tr. Vol. IV at 30:19-22; Trial Ex. 36.)

[34] (Trial Ex. 63.)

[35] (Trial Ex. 36.)

[36] (Tr. Vol. III at 165:17-166:14.)

[37] (Trial Ex. 40.)

information regarding the proposed merger. [38]

Fearing a fishing expedition, Medical Air's counsel responded to Defendants' request with a letter asking Defendants to identify the specific items they sought and the reasons for each request.[39] Defendants did not comply, stating that the only way to secure their cooperation was through full disclosure.[40]

In December 1996, Medical Air sent its shareholders a draft Agreement and Plan of Merger and related documents.[41] The draft merger documents were not to become final until Nortek received Medical Air's fourth-quarter financial results and completed due diligence.[42] Medical Air advised the shareholders that "[w]hile there are some provisions that may be revised in the final draft of the agreement, these documents reflect the essential structure and framework of the merger."[43]

For merger approval, Nortek required ninety-five percent of Medical Air's shareholders to vote in favor of the merger.[44] The ISA, however, excepted the need for Marwani's vote if Medical Air's Board certified in writing that the value of the consideration paid in the proposed merger

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[38] (Tr. Vol. III at 166:16-168:6; Trial Ex. 37.)

[39] (Tr. Vol. III at 86:2-88:10.)

[40] (Trial Ex. 44.)

[41] (Trial Ex. 45, 48.)

[42] (Tr. Vol. IV at 52:5-13.)

[43] (Trial Ex. 48.)

[44] (Trial Ex. 45 at § 7.6.)

met or exceeded the Qualifying Price, as defined in the ISA.[45] Medical Air's Board did not provide this written certification.[46] Thus, because Marwani owned fifteen percent of the shares, its vote was required for merger approval.

On December 19, 1996, Medical Air noticed the shareholder meeting for January 8, 1997.[47] Four days before the shareholder meeting, representatives of Medical Air and Marwan and Marwani met to discuss the proposed merger.[48] Marwan and Marwani continued to request the due-diligence information, which Medical Air had not provided.[49] At the January 8, 1997 shareholder meeting, Marwani voted against the proposed merger.[50]

Although the merger was not approved at the shareholder meeting, Nortek sent Medical Air a Second Letter of Intent on January 28, 1997.[51] Like the first, the Second Letter was non-binding, with its terms "subject to a number of conditions, including: negotiation of a definitive agreement, approval by Nortek's board of directors, year-end audit results satisfactory to Nortek and no material adverse change in business or projections."[52] Medical Air never

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[45] (Trial Ex. 6 at § 5.3.)

[46] (Tr. Vol. IIB at 59:15-18.)

[47] (Trial Ex. 47.)

[48] (Tr. Vol. IIA at 57:17-25.)

[49] (Id. at 58:9-59:10.)

[50] (Trial Ex. 51.)

[51] (Id.)

[52] (Id.)

notified Defendants of the Second Letter[53] and, despite negotiations, Medical Air never executed the Second Letter.[54]

On April 8, 1997, Medical Air sued Defendants for a declaratory judgment that Medical Air was not in default under the ISA, breach of contract and breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, conspiracy to breach the fiduciary duty, tortious interference with contractual relations, a 18 U.S.C. § 1362(b) (RICO) violation, and a Mass. Gen. Laws ch. 93A violation. This court granted Summary Judgment for Defendants on Medical Air's claim for declaratory judgment, concluding that -- as a matter of law -- Medical Air defaulted under the ISA. The court later granted Summary Judgment for Defendants on Medical Air's RICO violation, conspiracy, and ch. 93A claims.

CONCLUSIONS OF LAW

I. Plaintiff's Remaining Claims

A. Breach of Fiduciary Duty

Medical Air argues that Marwani breached its fiduciary duty as a shareholder by voting against the merger. A shareholder of a closely-held corporation owes a fiduciary duty of utmost good faith and loyalty.[55] But where a breach of the fiduciary duty is alleged, the defendant may show that it acted for a legitimate business purpose to assure that the affairs of the corporation

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[53] (Tr. Vol. IV at 6:23-7:16.)

[54] (Tr. Vol. III at 157:19-21.)

[55] Donahue v. Rodd Electrotype Co., 367 Mass. 578, 593 (1975).

were managed effectively in the best interests of all.[56] If the defendant demonstrates a legitimate business purpose, the burden shifts back to the plaintiff to prove that the same objective could have been achieved through an alternative, less harmful course of action.[57]

Medical Air argues that Marwani breached its fiduciary duty by failing to vote for the merger because Marwani knew Medical Air was running out of money, and voted against the merger because it thought Hague and Paradise would receive too much money and Rahbany too little. Marwani counters that it opposed the merger because, without the requested due-diligence information, it could not determine the proposed merger's price and terms. Moreover, Marwani contends that Medical Air's failure to certify that the merger was for a Qualified Price made it further skeptical of the deal.

By the shareholder meeting, Marwani had been requesting the due-diligence materials for almost two months. Section 4.5 of the ISA required Medical Air to deliver to Marwahl any reasonably requested information within five business days of the request. Given that Marwani was a substantial shareholder whose vote -- as Medical Air points out -- was necessary for merger approval, Marwani's request for due-diligence materials provided to Nortek was reasonable. Because the request was reasonable, the ISA required Medical Air to provide the materials.

But Medical Air's failure to produce the materials was not the only reason that Marwani questioned the deal's viability. The ISA gave Medical Air a way to avoid the need for Marwani's merger approval altogether by certifying that

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[56] Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 850-51 (1976).

[57] Id.

"the value of the consideration received in respect to each share of Medical's Common Stock equals or exceeds the Qualifying Price," as defined in the ISA. Medical Air never provided this certification.

At the time of the shareholder vote, therefore, Medical Air had refused for almost two months to provide Marwani the requested due-diligence materials. Marwani did not know the basis for the merger, the final terms of the merger, or the price that would be paid by Nortek for the merger. Lacking this information, Marwani certainly had a legitimate business reason for voting against the merger. Medical Air disagrees, arguing instead that this court should follow the Massachusetts Appeals Court decision in Smith v. Atlantic Properties, Inc..[58] In Atlantic Properties, four individuals formed the defendant corporation to purchase a piece of property. Each received a quarter interest in the corporation. The corporation's Articles of Incorporation required that 80% of the shareholders approve all acts of the Board of Directors.

Ill will arose between the shareholders over whether the corporation should declare dividends or use its profits for repairs and improvements to existing facilities on the property. One shareholder, Dr. Wolfson, wanted profits diverted to the latter, and the remaining shareholders sought a dividend declaration because of the tax penalty that would result from failing to do so. Although some repairs and improvements were made, Dr. Wolfson continued to vote against declaring dividends, and consequently the Internal Revenue Service imposed substaqtial penalty taxes.

The Massachusetts Appeals Court concluded that Dr. Wolfson's refusal to approve a dividend declaration was

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[58] 12 Mass. App. Ct. 201 (1981).

unreasonable.[59] It held that Dr. Wolfson "refused to vote dividends in any amount adequate to minimize the danger and had failed to bring forward, within the relevant taxable years, a convincing, definitive program of appropriate improvements which could withstand [IRS] scrutiny."[60] The court concluded that through his actions, Wolfson recklessly ran the unjustified risk that the IRS would impose the penalty taxes, and that this risk was inconsistent with his fiduciary duty.[61]

The facts in this case are distinguishable from Atlantic Properties. There, some repairs and improvements had been made to accommodate Dr. Wolfson's request. In addition, Dr. Wolfson was unable to show any improvement plan that would have avoided the penalty taxes, or any groinids on which he would have approved the dividend declaration. Unlike Dr. Wolfson, Marwani's request was information was never accommodated. Moreover, Marwani argues that it was prepared to vote for the merger if it had more information about the merger's terms and price.

Having shown a legitimate business purpose, the burden shifts back to Medical Air to prove that Marwani had a less harmful alternative available. Medical Air claims that Marwani would have been no worse off had it simply voted to approve the merger because Marwani would have retained all default rights afforded it under the ISA.

Medical Air fails to address, however, the deal itself. Regardless of Marwani's default rights under the ISA, Marwani was voting on whether Medical Air should merge with Nortek, a deal with substantial ramifications for all

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[59] Id. at 803.

[60] Id.

[61] Id.

involved. As stated above, the terms were still open to change, and the consideration was uncertain. In addition to its default rights, Marwani had to assess whether the deal was viable, and how it and Medical Air could be affected. Medical Air's failure to provide written certification that the consideration met a Qualifying Price and its refusal to provide the requested due-diligence information left Marwani with no choice but to vote against merger. By doing so, Marwani did not breach the fiduciary duty it owed to Medical Air.

B. Breach of Contract

Medical Air next alleges that MHC breached the Consulting Agreement by failing to provide the promises financial consulting services.[62] To prove breach of contract, a plaintiff must show an agreement, a breach of the agreement, and resulting damage.[63]

The Consulting Agreement required MHC to provide "financial and strategic corporate planning services" to Medical Air "including, by way of example: (i) assisting [Medical Air] in attracting a new senior lender; (ii) evaluating and helping source corporate transactions such as acquisitions, joint ventures and public offerings; and (iii) assisting [Medical Air] in developing financial and operating reporting systems."[64]

Medical Air argues that Flaherty failed to provide the promised services. It focuses on the fact that Flaherty met

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[62] The Complaint only references the ISA and the Security Agreement. Section 13.10, however, contains an integration clause, incorporating all exhibits into the agreement. One of the exhibits, Exhibit 3.7, is the Consulting Agreement.

[63] Michelson v. Digital Fin. Serv., 167 F.3d 715, 719 (1st Cir. 1999) (citation omitted).

[64] (Trial Ex. 11 at § 3.)

with Medical Air personnel only once a month and did not act as a financial officer or secure a new CFO. Medical Air further states that MHC did not assist in attracting a new lender or in developing reporting systems, and that Flaherty failed to inform Medical Air, when recommending a sales-force increase, that the new sales employees would not generate sales for the first six months. MHC's failure to perform under the Agreement, Medical Air contends, caused the company's June 1996 default. MHC counters that it provided Medical Air financial and strategic planning services, and that it was not obligated under the Agreement to find a Chief Financial Officer or to serve as Medical Air's interim CFO.

Evidence at Trial revealed that, while consulting, Flaherty met with Hague monthly,[65] and frequently communicated with the company by fax and telephone.[66] Flaherty also advised Medical Air concerning potential acquisitions.[67] He specifically forwarded information to Hague and Paradise on a Texas company, Z-Scan, referred to by Flaherty as ASSCO.[68] In fact, Medical Air's accountant, Joseph Faris, prepared an analysis on Medical Air acquiring ASSCO -- an analysis he forwarded to Flaherty.[69]

It also appears that Flaherty facilitated a change in the company's reporting systems.[70] Two months after

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[65] (Tr. Vol. IIA at 8:10-11.)

[66] (Tr. Vol. I at 102:10-25; 106:7-10.)

[67] (Tr. Vol. I at 106:8-23; Trial Ex. 17.)

[68] (Tr. Vol. I at 106:8-13; Trial Ex. 17.)

[69] (Tr. Vol. I at 186:4-21; Trial Ex. 18.)

[70] (Trial Ex. 16.)

Flaherty began serving as consultant, Medical Air began using a different financial reporting package.[71]

Additionally, Flaherty recommended and assisted Medical Air in increasing its sales force.[72] He discussed with Hague the need to establish a business advisory board and recommended that the board make decisions on issues such as acquisitions, staffing, and sales organization.[73] Flaherty assisted in changing Medical Air's accounting department.[74] Although no evidence exists on whether Flaherty took any action to attract a senior lender, this fact is not fatal given Flaherty's brief tenure as Medical Air's consultant.

Medical Air also claims that MHC's failure to find a permanent CFO for the company breached the contract. But nothing in the Consulting Agreement obligates MHC to locate a permanent CFO. The only reference in the Consulting Agreement to a CFO relates to the Agreement's term. It states that the Agreement "shall be for a term beginning [January 22, 1996] and continuing until the last day of the month in which [Medical Air] hires a Chief Financial Officer reasonably acceptable to [MHC]."[75]

The Consulting Agreement required MHC to provide Medical Air financial and strategic planning consultation. The evidence shows that MHC, through Flaherty, fully performed this contractual obligation.

C. Breach of the Implied Covenant of Good Faith

Every contract in Massachusetts contains an implied

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[71] (Trial Ex. 3.)

[72] (Tr. Vol. I at 100:16-101:4.)

[73] (Trial Ex. 14.)

[74] (Trial Ex. 19.)

[75] (Trial Ex. 11 at § 2.)

covenant of good faith and fair dealing between the parties that prohibits either party from doing "anything that will have the effect of destroying or injuring the right of the other party to receive thc fruits of the contract.[76]

Although Medical Air's breach of the implied covenant of good fair and fair dealing is brought against all Defendants, its argument is limited to Marwani. Medical Air alleges that Marwahl breached the covenant implied in the ISA when it voted against the Nortek merger. In support of its claim, Medical Air directs the court to the Massachusetts Supreme Judicial Court's (SJC) decision in Anthony's Pier Four, Inc. v. HBC Assoc.[77]

In Anthony's, Anthony's entered into agreements with HBC, whereby HBC would acquire and develop Boston's Fan Pier in conjunction with Anthony's development of Pier Four. The agreements gave Anthony's limited approval rights for changes in HBC's basic development plan. Anthony's owner, Anathas, worked on the development with HBC, and continuously voiced satisfaction with HBC's development plan.

Anathas later learned that another harborfront deal had been far more lucrative than that Anthony's had with HBC. Upset that he entered a less-than-ideal development contract, Anathas confronted HBC about better compensating Anthony's for the project. When HBC did not accommodate his request, Anathas stated, despite comments to the contrary, that he never formally approved HBC's development plan and now refused to approve it.[78] Anathas'

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[76] Anthony's Pier Four, Inc. v. HBC Assoc., 411 Mass. 451, 471-72 (1991) (citations omitted.)

[77] Id.

[78] Id. at 461.

s disapproval led HBC to stop work on the project.

HBC claimed that Anthony's breached the implied covenant of good faith and fair dealing in the agreements by disapproving the development plan. The Massachusetts Supreme Judicial Court affirmed the trial court, holding that Anthony's violated the implied covenant because Anathas voted against the plan based solely on his desire for better compensation.[79] The SJC concluded that Anathas knew his approval was crucial, and that he withheld it in an attempt to force HBC to "sweeten the deal." Such action constituted a breach.[80]

Defendants here did not exhibit the same level of disregard for a contracting party's rights. In Anthony's, Anathas did not dispute that the reason he withheld his approval was to "sweeten his deal" with HBC. Here Marwani states that it voted against the deal because it lacked sufficient information upon which to base its vote -- information the ISA required Medical Air to provide. Additionally, in Anthony's, Anathas's approval was required for the project to proceed, and his disapproval brought the project to a standstill. But here Marwani's vote was unnecessary if Medical Air's Board certified that the consideration for the merger met or exceeded the ISA-defined "Qualifying Price."

Given Medical Air's failure to provide the required information and its opportunity to completely avoid the need for Marwani's approval, this court cannot conclude that Marwani denied Medical Air the right to receive the fruits of the ISA and breached the implied covenant of good faith and fair dealing.

D. Tortious Interference with Contractual

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[79] Id. at 472.

[80] Id. at 473.

Relations

Medical Air next claims that Defendants tortiously interfered with the Nortek merger. To prove tortious interference, Medical Air must show that: (1) it had a prospective, advantageous relationship with Nortek; (2) Defendants induced Nortek not to go forward with the merger; (3) Defendants acted with intent; (4) Defendants' actions were improper; and (5) Defendants caused Medical Air injury.[81]

Medical Air contends that the Nortek merger would have gone through but for Marwani's vote against it. Marwani knew that Nortek would not go forward with the merger without its vote of approval, and Marwani's actions, Medical Air argues, caused Nortek to back out of the deal.

Medical Air's argument fails for several reasons. First, Medical Air has not shown that it had a prospective advantageous relationship with Nortek. Medical Air conceded at Trial that the terms and pr/ce of the proposed transaction were never finalized. In fact, Nortek's CEO, Richard Bready, testified that Nortek was not prepared to go forward with the merger because Medical Air failed to meet fourth-quarter projections.[82] Second, it is undisputed that Defendants never contacted anyone at Nortek.[83] In fact, Medical Air never informed Defendants of the Second Letter of Intent.

Because Medical Air cannot show that it had a prospective advantageous business relationship with Nortek and that Defendants induced Nortek to call off the merger,

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[81] See, United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 812-17 (1990).

[82] (Tr. Vol. IV at 39:21-40:2; 47:1-4.)

[83] (Id. at 63:13-15.)

Defendants did not engage in tortious interference.

II. Defendants' Counterclaims

Defendants counterclaim against Medical Air for action on the note, breach of the ISA, breach of the implied covenant of good faith and fair dealing, and for declaratory judgment that Marwan and Marwani are entitled to enforce their security fights under the ISA

A. Action on the Note/Breach of the ISA

Marwan claims that it is owed $1,015,236 -- the amount outstanding on the $625,000 loan -- plus interest accrued since Trial.[84] The ISA required Medical Air to immediately repay the loan in the event of default if Marwan exercised its fight to accelerate. Marwan exercised this right on September 3, 1996, but Medical Air failed to repay the amount due on the loan. Because the ISA contractually obligated Medical Air to immediately repay the loan in the event of default, Marwan is entitled to $1,015,236 plus interest accrued since Trial.

B. Breach of the Covenant of Good Faith and Fair Dealing

Marwan and Marwani claim that Medical Air breached the implied covenant in the ISA by refusing to provide the requested due-diligence information and still holding the shareholder meeting on January 8, 1997. They further claim that breach occurred because Medical Air held the merger vote when the terms of the proposed merger were being renegotiated.

The ISA required Marwani's merger approval if Medical Air failed to certify that the consideration to be received met or exceeded the Qualifying Price. Because Medical Air did not certify the price, a shareholder vote was required. If Marwani had insufficient information or was

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[84] (Tr. Vol. IIB at 62:11-21.)

dissatisfied with the finality of the merger terms, it could vote against the merger, which it did. Because Marwan and Marwani retained all rights under the ISA, Medical A/r did not breach the implied covenant of good faith and fair dealing.

C. Declaratory Judgment

As this court found at Summary Judgment, Medical Air was in default under the ISA. Thus, Marwan and Marwani are entitled to enforce the security rights provided in the ISA

CONCLUSION

In sum, the court finds for Defendants on Medical Air's claims, and for Medical Air on Defendants' counterclaim for breach of the implied covenant of good faith and fair dealing claim. Defendants, however, prevail on their counterclaims for action on the note, breach of the ISA, and for declaratory judgment.

AN ORDER WILL ISSUE.

/s/_____
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MEDICAL AIR TECHNOLOGY CORPORATION	)Civil Action)#97-10764-) JLT
Plaintiff	)
v.	)
MARWAN INVESTMENT, INC., MARWANI HOLDING COMPANY, N.V., MULTIFINANCE HOLDING CORPORATION AND DR. K. PHILLIP RAHBANY	)
Defendants	)

ORDER

January 17, 2001

TAURO, J.,

The court hereby orders as follows:

(1) Defendants' Motion for Leave to File in Excess of Page Limit [95-1] is DENIED as moot;

(2) Defendants' Motion [84-1] [105-1] for Leave to File a Reply Memorandum are ALLOWED;

(3) Defendants' Motion to Strike Plaintiff's Jury Demand [69-1] is ALLOWED based on Plaintiff's jury waiver in the Security Agreement;

(4) Defendants' Motion for Summary Judgment [94-1] is ALLOWED in part and DENIED in part:

(A) Defendants' Motion is DENIED on Plaintiff's claims for Breach of Contract/Breach of Implied Covenant of Good Faith and Fair Dealing, Breach of Fiduciary Duty against Marwani and Tortious Interference with Contractual Relations;

(B) Defendants' Motion is ALLOWED, without objection, on Plaintiff's RICO claim. Defendants' Motion also is ALLOWED on Plaintiff's Mass.Gen.Laws. ch. § 93A claim because Plaintiff alleges only intra-company conduct. See Manning v. Zuckerman, 388 Mass. 8, 12 (1983) ("[T]he unfair or deceptive acts or practices prohibited [under Mass.Gen.Laws, ch. § 93A] are those that may arise in dealings between discrete, independent business entities, and not those that may occur within a single company.");

(C) Defendants' Motion on Plaintiff's Conspiracy to Breach a Fiduciary Duty claim against Marwan, MFH, and Rahbany remains under advisement, pending Plaintiff's January 18, 2001 filing on the issue.

IT IS SO ORDERED.

/s/_____
United States District Judge

No. 02-742

IN THE

Supreme Court of the United States

MEDICAL AIR TECHNOLOGY CORPORATION,

Petitioner,

v.

MARWAN INVESTMENT, INC.,
MARWANI HOLDING COMPANY, N.V.,
MULTIFINANCE HOLDING CORPORATION, AND
DR. K. PHILIP RAHBANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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Dated: December 13, 2002

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QUESTION PRESENTED FOR REVIEW

Whether this Honorable Court should review the judgment of the Court of Appeals for the First Circuit affirming the District Court's post-trial judgment that Petitioner Medical Air Technology Corporation ("Medical Air") failed to demonstrate that Respondent Marwani Holding Company, N.V. ("Marwani Holding") had breached its fiduciary duty by voting against a proposed merger between Medical Air and a third party, where (1) the judgment of the Court of Appeals rests solely on the application of Massachusetts state law, (2) the questions presented in the Petition are not outcome determinative, given the Court of Appeals' conclusion that "[n]o reasonable jury could find that Marwani Holding's vote was the proximate cause of the demise of the proposed Nortek merger," (3) ample evidence supports that determination, and (4) the Court of Appeals never decided the only federal question that the Petition purports to present — whether the District Court erred in striking Medical Air's jury demand.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, the Respondents respectfully submit this disclosure statement.

1. Respondent Marwan Investment, Inc. is a Delaware corporation. Marwan Investment, Inc. is wholly-owned by Sarah Financial Limited, a Delaware corporation, which in turn is wholly-owned by Hamda Investment, N.V., a Netherlands Antilles corporation. Hamda Investment, N.V. is wholly-owned by Multifinance Investment and Holding, S.A., a Luxembourg corporation. No publicly-held company owns 10% or more of the stock of any of the above-listed entities.

2. Respondent Marwani Holding Company, N.V. is a Netherlands Antilles corporation. Marwani Holding Company, N.V. is wholly-owned by Multifinance Investment and Holding, S.A., a Luxembourg corporation. No publicly-held company owns 10% or more of the stock of any of the above-listed entities.

3. Respondent Multifinance Holding Corporation is a Delaware corporation. Multifinance Holding Corporation is wholly-owned by Sarah Financial Limited, a Delaware corporation, which in turn is wholly-owned by Hamda Investment, N.V., a Netherlands Antilles corporation. Hamda Investment, N.V. is wholly-owned by Multifinance Investment and Holding, S.A., a Luxembourg corporation. No publicly-held company owns 10% or more of the stock of any of the above-listed entities.

4. Respondent Dr. K. Philip Rahbany is an individual.

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BRIEF IN OPPOSITION

The Respondents, Marwan Investment, Inc. ("Marwan Investment"), Marwani Holding Company, N.V. ("Marwani Holding"), Multifinance Holding Corporation ("Multifinance"), and Dr. K. Philip Rahbany ("Rahbany"), respectfully oppose the Petition ("Pet.") filed by Medical Air Technology Corporation ("Medical Air") for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit in this case.

This action involves the application of settled principles of Massachusetts law on breach of fiduciary duty. The central matter in the lawsuit concerns the vote of a minority shareholder, Marwani Holding, regarding a proposed merger between Medical Air and a third party, Nortek, Inc. ("Nortek"). The Petition fails to present any issue of recurring importance or involving a conflict with decisions of this Court or other courts of appeal. In fact, given the Court of Appeals' holding that "[n]o reasonable jury could find that Marwani Holding's vote was the proximate cause of the demise of the proposed Nortek merger," Pet. App. at 20a, the questions presented in the Petition would not change the outcome in this case. Indeed, the sole federal question that the Petition attempts to present — whether the District Court erred in striking Medical Air's jury demand — was not even decided by the Court of Appeals.

The Petition represents nothing more than Medical Air's dissatisfaction with the Court of Appeals' application of properly stated Massachusetts law. Because the decision of the Court of Appeals is not only unworthy of review but also clearly correct, the Petition should be denied.

STATEMENT OF THE CASE

This case arises out of a $1.375 million investment that Marwan Investment and Marwani Holding made in Medical Air pursuant to a January 22, 1996 Investment and Stockholders Agreement (the "ISA"), a Secured Promissory Note (the "Note"), and a Security Agreement. As the District Court held in January, 1998, when it granted partial summary judgment to the Respondents — a judgment which Medical Air has never challenged on appeal — Medical Air failed in May, 1996, to maintain certain minimum financial covenants of the ISA, which triggered an Event of Default. After reserving their rights in light of Medical Air's default, Marwan Investment and Marwani Holding (defined collectively in the ISA as the "Investors") forebore from the exercise of their security rights while Medical Air pursued negotiations of a potential merger with Nortek that would "take out" the Investors' interests in Medical Air. When Medical Air presented a draft merger agreement to its shareholders (including Marwani Holding) for approval, without having reached agreement on material terms of the proposed merger (including the purchase price, which was being renegotiated at Nortek's insistence), Marwani Holding voted against it. Medical Air and Nortek continued their negotiations, but never presented a further proposal to Medical Air's shareholders for consideration.[1]

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[1] Contrary to Medical Air's assertion that Marwani Holding and Marwan Investment each was "pursuing its remedies against Medical Air" as of the date of the vote on the merger (Pet. at 16), and that the vote "paved the way" for the foreclosure (id. at 5 n.2), the record demonstrates that the Investors continued to forbear in the exercise of their security rights until August, 1998 — nineteen months after the January 8, 1997 vote on the merger, sixteen months after Medical Air commenced this action, and seven months after the District Court found that Medical Air had defaulted under the ISA — when, with no acquisition offer

Although Medical Air and Nortek never reached final agreement on merger terms, Medical Air has for the past five years pursued claims against Marwani Holding based on its vote against the proposed merger, which, according to Medical Air, "thwarted that merger." Pet. at 12. In particular, Medical Air contended at trial, *inter alia*, that by voting against the proposed merger, Marwani Holding breached the fiduciary duty it owed under Massachusetts law as a minority shareholder in a closely-held corporation. The District Court conducted a four-day trial in this matter in January, 2001. The District Court issued its post-trial Findings of Fact and Conclusions of Law in an August 21, 2001 Memorandum (Pet. App. at 29a-48a), in which it addressed and, in turn, rejected each of Medical Air's claims. The District Court then entered judgment for Marwan Investment on its Counterclaim against Medical Air for $1,015,236 accrued under the unpaid Note from Medical Air, plus post-trial interest. Id. at 27a-28a.

Medical Air raised two issues on its appeal to the Court of Appeals for the First Circuit: whether the District Court erred (1) by striking Medical Air's jury demand, or (2) by finding as a matter of fact, after trial, that Marwani Holding had not breached its fiduciary duty to Medical Air. The Court of Appeals determined that it was unnecessary to reach the former issue in order to resolve Medical Air's appeal,

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pending, and none contemplated, Marwan Investment finally began foreclosure proceedings against Medical Air's assets. Pet. App. at 9a. Marwan Investment foreclosed on all of Medical Air's tangible and intangible assets at a duly noticed public auction, conducted on November 6, 1998. At the public auction, Marwan Investment purchased all of Medical Air's remaining assets with a credit bid deducted from the amounts Medical Air owed to Marwan Investment, without objection from the Medical Air officers and directors who attended the auction. Id. at 9a.

because the District Court's judgment could be affirmed in its entirety on independent, state law grounds:

> We do not, though, need to decide the [jury waiver] issue. As we hold below, no reasonable jury could find liability for breach of fiduciary duty against Marwani Holding nor a causal link between Marwani Holding's vote at the January 8 board meeting and the failure of the proposed merger with Nortek.
>
> Because the core ruling is correct and none of Medical Air's claims could survive a motion for judgment as a matter of law, the jury waiver question is no longer viable.

Id. at 15a.

Turning to Medical Air's fiduciary duty claim, the Court of Appeals recognized that, under Massachusetts law, a shareholder in a close corporation may defeat a claim for breach of fiduciary duty by demonstrating a legitimate business purpose for its actions. Id. at 15a-16a. The Court of Appeals then determined that the evidence presented at trial more than sufficiently supported the District Court's finding that Marwani Holding had legitimate business reasons for voting against the proposed Nortek merger. In particular, the Court of Appeals found that Medical Air's refusal for almost two months to comply with Marwani Holding's repeated requests for basic information about the proposed merger (despite Medical Air's contractual obligation to do so under the ISA) not only led Marwani Holding to question the viability of the deal, but also left it without basic information that it needed to cast an informed vote on the proposal:

> The district court correctly found that Marwani Holding had shown a legitimate business rationale for the vote against the merger. To begin with, Marwani Holding did lack material information about the proposed merger and Medical Air had failed to provide Marwani Holding with the requested due diligence materials. Marwani Holding also had a suspicion, reasonable in context, that the deal was based on unrealistic assumptions that would ultimately doom it, and that it served only as a distraction from the real problems facing Medical Air. This suspicion was well-founded; Medical Air's CEO admitted at trial that the fourth quarter sales estimates for 1996 provided to Nortek were above what Medical Air had ever accomplished before and far exceeded its actual fourth quarter sales results. These reasons more than suffice to show a legitimate business reason for Marwani's vote.

Id. at 18a-19a.[2]

The Court of Appeals also rejected Medical Air's fiduciary duty claim on a wholly independent ground: lack of causation. Contrary to Medical Air's misstatements of the record evidence concerning the

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[2] This record evidence of Marwani Holding's legitimate business reasons for voting against the Nortek merger contrasts with Medical Air's bare assertions that "Marwani Holding's selfish motivation and lack of consideration for the well being of Medical Air [are] uncontroverted," and that "Marwani Holding's President could not articulate a legitimate Medical Air business purpose for his vote." Pet. at 9, 15.

reasons for the failure of the Nortek merger — *e.g.*, that Marwani Holding's vote had "catastrophic effects" on Medical Air and "thwarted" the merger (Pet. at 9, 12), the Court of Appeals held that Medical Air's failure to meet its own fourth-quarter sales projections (and not the actions of Marwani Holding or any other defendant) led Nortek to renegotiate the potential purchase price and attempt to restructure the proposed deal, before Marwani Holding even voted on the merger:

> Nortek's CEO testified at trial (through deposition) that after Nortek saw the fourth quarter sales results [of Medical Air], it decided that it should pay less than was offered in the original letter of intent and reopened negotiations with Medical Air.... It is clear that Nortek was not willing to go through with the terms of the earlier proposed merger put before the Board that Marwani voted against. ***Even if Marwani Holding had voted for the proposed merger, it would have made no difference.*** Medical Air still would have been in the same position as it was after the January 8 vote, negotiating new terms with Nortek.

Pet. App. at 19a-20a (emphasis added). In other words, at the time of the vote in question, Medical Air asked Marwani Holding to approve a proposed merger that (unbeknownst to Marwani Holding) was no longer the proposal that Medical Air and Nortek were negotiating, and was not a proposal on which Nortek was willing to conclude a merger. Id. at 7a-8a.[3]

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[3] Medical Air misstates the factual record below when it claims that "negotiations with Nortek were reopened" ***after*** the January 8, 1997 vote. Pet. at 6. As the Court of Appeals noted,

Therefore, because "[n]o reasonable jury could find that Marwani Holding's vote was the proximate cause of the demise of the proposed Nortek merger," the Court of Appeals held that Medical Air's fiduciary duty claim could be rejected for this reason alone. Id. at 20a.[4]

REASONS FOR DENYING THE PETITION

A. THE DECISION OF THE COURT OF APPEALS DOES NOT PRESENT ANY ISSUE WORTHY OF SUPREME COURT REVIEW.

The Petition should be denied because (1) the judgment of the Court of Appeals rests entirely on principles of Massachusetts state law, (2) the questions presented in the Petition are not outcome determinative, (3) the Petition complains only of a purported misapplication of properly stated rules of law and erroneous factual findings, and (4) the sole federal question raised in the Petition was not decided by the Court of Appeals, and, in any event, does not require this Court's consideration.

Medical Air and Nortek reopened their negotiations on the day ***before*** the vote of Medical Air's shareholders. Pet. App. at 7a-8a.

[4] The Court of Appeals determined that this lack of causation also defeated Medical Air's claims for tortious interference and breach of the implied covenant of good faith and fair dealing, Pet. App. at 20a-21a, and further held that Medical Air's breach of contract claim is "no longer Medical Air's to make," because this claim was assigned to Marwan Investment when Marwan Investment purchased all of Medical Air's tangible and intangible assets at a foreclosure sale in November, 1998. Id. at 22a-23a. Although Medical Air did not appeal the merits of the District Court's rulings on these three claims, the Court of Appeals nonetheless addressed them only for purposes of Medical Air's appeal of the denial of a jury trial. Id. at 20a n.5.

1. The Judgment of the Court of Appeals Rests Entirely on State Law.

The principal aspect of the Court of Appeals' decision that Medical Air seeks to challenge in this Court is the First Circuit's application of settled principles of Massachusetts state law concerning the fiduciary duties owed by shareholders in a closely held corporation. This is apparent on the face of the Petition. See Pet. at 9-18. Although the Court of Appeals reviewed the "basic principles" applicable to an analysis of Medical Air's contractual jury trial waiver (Pet. App. at 12a-15a), the Court of Appeals ultimately found it unnecessary to apply these principles, because Medical Air's appeal could be resolved entirely on independent state law grounds. Id. at 15a. Accordingly, because the judgment of the Court of Appeals in this diversity action rests solely on principles of Massachusetts law, the Court of Appeals did not decide any federal question (let alone an important federal question) worthy of this Court's review.[5]

2. The Questions Presented in the Petition Are Not Outcome Determinative, As the Judgment of the Court of Appeals Rests on Independent Grounds.

Medical Air seeks to present two questions for this Court's review: (1) whether the Court of Appeals erred in affirming the District Court's judgment that Marwani Holding did not breach its fiduciary duty by voting against the proposed Nortek merger, and (2) whether the District Court erred in striking Medical

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[5] Medical Air never contends that this issue of Massachusetts law presents a sufficiently important legal question to warrant the exercise of this Court's discretion to grant a writ of certiorari.

Air's jury demand (an issue which the Court of Appeals did not decide). Pet. at i.[6] However, because neither of these questions are necessary to determine the outcome in this case, this Court's consideration is not warranted.

As discussed above, although the Court of Appeals affirmed the District Court's finding that Medical Air had failed to establish at trial that Marwani Holding breached its fiduciary duty to Medical Air (Pet. App. at 15a-19a), the Court held that the District Court's judgment could be upheld in its entirety on an independent ground — lack of causation. Id. at 19a-20a. Based on its review of the evidence, the Court of Appeals held that "[n]o reasonable jury could find that Marwani Holding's vote was the proximate cause of the demise of the proposed Nortek merger" — the only purported injury advanced at trial by Medical Air. Id. at 20a. Therefore, even if Medical Air could show that the Court of Appeals erred in its application of Massachusetts law in finding that Marwani Holding did not breach its fiduciary duty, judgment nonetheless would have entered for Marwani Holding on this claim based on the failure of evidence on causation.

The Court of Appeals then held that, as a matter of law, Medical Air's inability to establish a causal link between Marwani Holding's vote and the

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[6] In its statement of the "Questions Presented," Medical Air misstates the record below by suggesting that one question for this Court's review is "[w]hether the Court of Appeals erred in upholding the District Court's allowance of defendants' motion to strike plaintiff's jury claim as to all parties ...." Pet. at i. As set forth below, the Court of Appeals never decided this question. The Court of Appeals based its judgment solely on state law grounds.

failure of the Nortek merger also would operate to defeat two of Medical Air's claims that remained for trial (tortious interference and breach of the implied covenant of good faith and fair dealing) regardless of the resolution of the jury waiver issue, and rejected Medical Air's last claim (breach of contract) on a ground that Medical Air does not challenge in its Petition. Id. at 20a-23a. Accordingly, as the Court of Appeals' decision rests on grounds that are independent of the two questions presented in the Petition, Medical Air fails to present any issue worthy of this Court's review.

3. The Petition's Claims of Misapplication of Properly Stated Massachusetts Law and Erroneous Factual Findings Are Inaccurate and Would Not Merit This Court's Intervention Regardless.

Medical Air concedes that its challenge to the Court of Appeals' analysis of the fiduciary duty claim rests primarily on a purported misapplication — rather than a misstatement — of governing Massachusetts law. See Pet. at 9, 11 (asserting that Court of Appeals "misapplied" applicable law on fiduciary duty).[7] The Petition also seeks to relitigate

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[7] Later in the Petition, Medical Air half-heartedly challenges the Court of Appeals' legal conclusion that, under Massachusetts law, a legitimate business purpose is not negated by the mere fact that this purpose coincides with a shareholder's self-interest (Pet. at 13; Pet. App. at 18a). As set forth below, see note 15 *infra*, the First Circuit correctly set forth and applied Massachusetts law on this point.

Further, although Medical Air contends that the *District Court* (not the Court of Appeals) "misstated applicable Massachusetts law" by articulating an "effective management" concept in its legitimate business purpose inquiry (Pet. at 11 n.4 (emphasis in original)), the language from the District Court

the facts bearing on this claim, for example, by taking issue with the Court of Appeals' conclusion that Marwani Holding had shown a legitimate business purpose for its vote against the Nortek merger (id. at 14-17), or that this vote did not cause the failure of the Nortek merger (id. at 12).[8]

The application of well-settled rules to disputed facts is not the type of situation in which this Court customarily intervenes, nor should it. See U.S. Supreme Ct. Rule 10. The central issue presented in the Petition — the case-specific determination of whether Medical Air offered adequate proof to establish a claim for breach of fiduciary duty — is a matter the Court of Appeals was well-equipped to

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decision challenged by Medical Air is taken directly from a seminal Massachusetts Supreme Judicial Court decision addressing the fiduciary obligations of shareholders in close corporations. See Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 850, 353 N.E.2d 657, 663 (1976) (noting that "untempered application" of strict good faith standard would "result in the imposition of limitations on legitimate action ... which will unduly hamper its *effectiveness in managing the corporation in the best interests of all concerned.*" (emphasis added)). The Wilkes Court adopted the burden-shifting framework discussed in section B *infra* to shield such "legitimate action" from scrutiny. See id. at 851, 335 N.E.2d at 663. Thus, far from "misstating" the law, by referencing the "effective management" concept the District Court evidenced its appreciation of the rationale underlying the legal standard.

[8] Indeed, unable to respond to the First Circuit's finding that "no reasonable jury could find ... a causal link between Marwani Holding's vote at the January 8 board meeting and the failure of the proposed merger with Nortek" (Pet. App. at 15a), Medical Air attempts to sidestep this critical finding by twice recasting it as "[t]he Court of Appeals determination that 'no reasonable jury could conclude' the Nortek merger was to occur ...." Pet. at 12 n.5, 20. Thus, not only does Medical Air seek to relitigate factual issues in this Court, but it also seeks review based on an alleged factual finding that the Court of Appeals never made.

address, and therefore does not require this Court's consideration.

4. The Court of Appeals Did Not Decide the Sole Federal Question Raised in the Petition, and the Question Does Not Require Resolution or Clarification in Any Event.

The Court of Appeals never decided the only federal question presented in the Petition — whether the District Court properly struck Medical Air's jury demand. The absence of any federal law-based challenge to the decision of the Court of Appeals is one reason for denying the Petition (see section A.1 *supra*), and Medical Air presents no countervailing reason for finding that the District Court's decision on the jury waiver issue warrants review by this Court. Medical Air does not assert that either the Court of Appeals or the District Court misstated the governing law. Medical Air also fails to identify any conflict between the District Court's decision and those of either this Court or the courts of appeal on the jury waiver issue. Nor is there any suggestion in the Petition that the analysis of Medical Air's contractual jury trial waiver presents an important or recurring question of law that has not been, but should be, settled by this Court.[9]

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[9] Medical Air's suggestion that the District Court heard argument on the pending motion to strike Medical Air's jury demand "without warning" is not only irrelevant, but also ignores the procedural record. Pet. at 20. Respondents moved to strike Medical Air's jury demand on August 10, 2000, Medical Air submitted its opposition on September 5, 2000 (with a supporting affidavit and without any request for an evidentiary hearing), and Respondents filed a reply memorandum on September 12, 2000. The Respondents then identified this fully-briefed motion as a "pending motion" in their pre-trial status report to the District Court on November 17, 2000. Accordingly, it should have come as

At most, Medical Air complains only that the District Court made a factual error in finding that Medical Air "knowingly and intentionally" waived its right to a jury trial by contract. Even if the issue were relevant to the outcome of the Court of Appeals' decision, this case-specific factual determination by the trial court does not warrant the exercise of this Court's discretion to grant a writ of certiorari. See Pet. App. at 14a (noting that analysis of "voluntary and knowing" nature of waiver is "a fact-based inquiry").[10]

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no surprise to the parties that when the District Court scheduled a hearing on a pending motion for summary judgment for ten days prior to the scheduled start of trial, the Court also requested argument on all other pending motions. In any event, Medical Air never even requested oral argument on the motion.

[10] Medical Air's discussion of this issue misstates the record. For instance, contrary to Medical Air's assertion "that there was no evidence before the court of a knowing and voluntary waiver" (Pet. at 19), the record below demonstrates that the Medical Air executives who negotiated the terms of Marwan Investment's and Marwani Holding's investment in Medical Air were experienced businessmen, who were assisted by counsel throughout these negotiations. Pet. App. at 4a. Further, the jury waiver provision was clearly and conspicuously set forth in an agreement that Medical Air considered so central to the parties' relationship that Medical Air selected only this agreement and two other documents from the closing binder for the transaction (out of the "over twenty documents" executed by the parties (Pet. at 2)) to attach as exhibits to its Complaint. Moreover, given that Medical Air acknowledges that its jury waiver is enforceable at least by Marwan Investment (see Pet. App. at 14a), Medical Air has necessarily conceded that this provision was conspicuous. Courts routinely cite such objective factors in concluding that a contractual jury waiver provision was entered into knowingly and intentionally, and thus is enforceable. See, e.g., Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837 (10th Cir. 1988); Leasing Service Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986).

B. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

This Court's review is unnecessary for the additional reason that the Court of Appeals' rejection of Medical Air's breach of fiduciary duty claim is both legally and factually correct. Pet. App. at 15a-20a. The burden-shifting framework that the Court of Appeals articulated (id. at 15a-16a) is the appropriate legal standard. As the Court of Appeals recognized, shareholders in a Massachusetts close corporation owe a fiduciary duty of utmost good faith and loyalty. See Donahue v. Rodd Electrotype Co., 367 Mass. 578, 592-93, 328 N.E.2d 505, 515 (1975). Where a breach of this fiduciary duty is alleged, the burden is on the defendant to "demonstrate a legitimate business purpose for its action." Wilkes, 370 Mass. at 850-51, 353 N.E.2d at 663. If the defendant meets this burden, "no liability will result unless the [plaintiff] succeeds in showing that the proffered legitimate objective could have been achieved through a less harmful, reasonably practicable, alternative mode of action." Zimmerman v. Bogoff, 402 Mass. 650, 657, 524 N.E.2d 849, 853 (1988). Thus, there was no error of law.

Further, the trial evidence more than sufficiently supported the finding that Marwani Holding had legitimate business reasons to vote against the proposed merger — Marwani Holding "lack[ed] material information about the proposed merger" and "had a suspicion, reasonable in context, that the deal was based on unrealistic assumptions that would ultimately doom it, and that it served only as a distraction from the real problems facing Medical Air." Pet. App. at 18a-19a. At the time of the vote, Medical Air had refused for almost two months to honor Marwani Holding's repeated requests for copies of the due diligence materials that had been provided to Nortek. Id. at 5a-6a. Dr. Rahbany (Marwani

Holding's Agent) testified that, in his view, Marwani Holding had a duty as a shareholder of Medical Air to cast an informed vote on the Nortek proposal, which is why he requested copies of these due diligence materials. Id. at 5a, 8a.[11] Dr. Rahbany further testified that these materials would allow him to assess whether the proposed purchase price was based on credible representations and financial projections, and thus whether the Nortek proposal ultimately would be viable. Id. at 5a, 7a-8a.[12] He also explained why the viability of the Nortek proposal was important: given Medical Air's financial difficulties, it was preferable that Medical Air's management focus on improving the company's performance, rather than devote significant time and resources to negotiating a proposal with Nortek that might not be sustainable. Id. at 19a. As Dr. Rahbany testified, "Nobody buys your problems: you have to solve them."

This testimony amply supports the Court of Appeals' findings as to Marwani Holding's reasons for voting against the Nortek proposal. It was certainly reasonable (as the Court of Appeals found) for a shareholder — acting with the best interests of Medical Air and his fellow shareholders in mind — to vote against a transaction where he lacked basic information about the basis and viability of the proposed transaction. Id. at 17a-19a. Arguably, it

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[11] Even after the vote, Marwani Holding continued to request information about Medical Air's negotiations with Nortek. Pet. App. at 9a.

[12] Further, Medical Air's decision to seek Marwani Holding's approval of the Nortek proposal, rather than proceed under the "Qualifying Price" certification provision of the ISA — pursuant to which Medical Air could have proceeded with a merger without such approval — led Dr. Rahbany to question further the sustainability of the proposal through the course of negotiations with Nortek. Pet. App. at 8a & n.1.

would be entirely inconsistent with a shareholder's fiduciary duties to vote in favor of such a significant transaction without knowing such material information about the proposal.[13]

Medical Air contends that the Court of Appeals should have placed greater weight on Marwani Holding's alleged "admissions" that its vote also served its own self-interests. Pet. at 16-17. Even if Medical Air's characterization of this testimony were accurate,[14] the Court of Appeals correctly determined that where, as here, challenged conduct serves the

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[13] The judgment of the Court of Appeals also may be upheld on the alternative ground that, under Massachusetts law, Marwani Holding's vote on the proposed merger was not subject to the fiduciary duties ordinarily owed by shareholders in a close corporation. Those duties do not apply where the issue before the shareholders involves pre-approved procedures set forth in the company's organizational documents or stockholder agreements. See, e.g., Donahue, 367 Mass. at 598 n.24, 328 N.E.2d at 518 n.24 (heightened fiduciary duties are not implicated where "all other stockholders give advance consent to the stock purchase arrangements through acceptance of an appropriate provision in the articles of organization, the corporate by-laws ... or a stockholder's agreement"). The proposed Nortek transaction triggered the merger and stock-redemption procedures of the ISA and Medical Air's Amended Articles of Organization — which Medical Air chose not to, or otherwise failed to, follow. See Pet. App. at 6a-8a. Accordingly, under Donahue, because Marwani Holding's vote against the Nortek proposal was consistent with its agreed-upon rights, its vote was not governed by heightened fiduciary duties. See Donahue, 367 Mass. at 598 n.24, 328 N.E.2d at 518 n.24; Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 408, 649 N.E.2d 1102, 1105-06 (1995) ("when all the stockholders in advance enter into agreements," questions of fiduciary duty do not arise regarding conduct that falls within the terms of those agreements).

[14] The Court of Appeals expressly acknowledged this testimony, but found that it did not provide the conclusive proof of Marwani Holding's motivation that Medical Air attributes to it. Pet. App. at 8a-9a, 17a-18a.

interests of the corporation and of the shareholder, the "legitimate purpose" articulated by the shareholder "is not negated if [the shareholder's] vote also coincided with its self-interest." Pet. App. at 18a ("self-interest may be a proper motive for a stockholder's actions, so long as that interest does not result in acts in derogation of the stockholder's fiduciary duty").[15] As noted, Marwani Holding did not have sufficient information to assess whether the proposed merger was in the best interests of Medical Air, and thus voted against the proposal. At most, Medical Air suggests that Marwani Holding's own interests provided it with further reasons to vote against the proposed transaction. Given the alignment of these interests, Medical Air cannot claim that Marwani Holding breached its fiduciary duty simply by voting in accordance with both interests. As the Court of Appeals recognized:

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[15] This statement is entirely consistent with the decisions of the Massachusetts Supreme Judicial Court addressing the fiduciary duties of stockholders in close corporations. See Blank, 420 Mass. at 408, 649 N.E.2d at 1105 (stockholders "may not act out of avarice, expediency, or self-interest *in derogation of* their duty of loyalty to the other stockholders and to the corporation" (emphasis added)); Wilkes, 370 Mass. at 850-51, 353 N.E.2d at 663 (majority stockholders "have certain rights to what has been termed 'selfish ownership' in the corporation which should be balanced against the concept of their fiduciary obligation"). The sole case cited by Medical Air to contradict the statement of the Court of Appeals — "This is not the law" (Pet. at 13) — is inapposite. In Merola v. Exergen Corp., even though the majority shareholder could not show a legitimate business purpose for terminating the employment of a minority shareholder, the Court nonetheless concluded that the termination did not give rise to a breach of fiduciary duty. See Merola v. Exergen Corp., 423 Mass. 461, 465-66, 668 N.E.2d 351, 354-55 (1996). Thus, Merola does not support Medical Air's suggestion that a legitimate business purpose is negated if the shareholder is acting both in the interest of the corporation and in his own self-interest.

> Admittedly, there may be tensions between the two types of interests — loyalty to the corporation and selfish ownership. *Difficult cases will arise where the dividing line is not clear. This is not one of those cases.*

Id. (emphasis added).[16]

Additionally, the evidence presented at trial is more than sufficient to support the First Circuit's conclusion that "[n]o reasonable jury could find that Marwani Holding's vote was the proximate cause of the demise of the proposed Nortek merger," which the Court of Appeals cited as a separate and independent ground for rejecting Medical Air's fiduciary duty claim. Id. at 19a-20a; see Clark v. Rowe, 428 Mass. 339, 345, 701 N.E.2d 624, 628 (1998) (to establish liability for breach of fiduciary duty, plaintiff must prove that alleged breach was proximate cause of damage). Nortek's Chairman and Chief Executive Officer testified that Nortek decided to renegotiate the purchase price and restructure the proposed

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[16] The Court of Appeals concluded its analysis of the alleged breach of fiduciary duty by finding that Medical Air had not met its burden of showing that the legitimate business purpose articulated by Marwani Holding could have been achieved through a less harmful course of action. Pet. App. at 19a. Medical Air did not dispute the District Court's identical finding on this issue in Medical Air's submission to the Court of Appeals, and thus has waived any argument on this question before this Court. See United States v. United Foods, Inc., 533 U.S. 405, 417 (2001). In any event, the Court of Appeals correctly concluded that the alternative proposed by Medical Air — that Marwani Holding could have simply voted for the merger (Pet. at 17-18) — "is not a reasonable and practicable alternative," as it would not have resolved Marwani Holding's "legitimate concerns about what form the deal would ultimately take, or whether the whole deal was simply a chimera." Pet. App. at 19a.

transaction because Medical Air missed the fourth quarter sales projections that it had provided to induce Nortek's interest in the first instance. Pet. App. at 8a.[17] He also testified that Marwani Holding's vote on the proposed merger had no bearing on Nortek's decision to restructure the transaction with Medical Air, and that after Nortek reviewed Medical Air's fourth quarter sales results, Nortek was not willing to go forward with the transaction under consideration. Id. at 5a, 19a-20a.

The record below also supports the conclusion that Nortek's negotiations with Medical Air, including negotiations of the purchase price, were not finalized as of the date of the shareholder vote. For instance, even though Medical Air had represented to its shareholders that the draft merger documents submitted to them for approval "reflect the essential structure and framework of the merger," that structure and framework had changed substantially by the date of the shareholder vote, as Medical Air already had suggested to Nortek, in writing, "a restructuring of our agreement to include a performance consideration." In other words, on January 8, 1997, Medical Air asked Marwani Holding to approve a proposed transaction that (unbeknownst to Marwani Holding) Medical Air and Nortek were not even contemplating. Id. at 7a-8a, 19a-20a. Accordingly, as the Court of Appeals determined, the loss of the proposed merger was not, and could not have been, caused by Marwani Holding's failure to vote in favor of a proposal that, by the time of that

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[17] Indeed, Medical Air at least occasionally concedes that Medical Air and Nortek reopened their negotiations "because Medical Air had failed to meet its fourth quarter projections." Pet. at 6.

vote, Medical Air and Nortek were no longer pursuing. Id. at 20a.

CONCLUSION

For all of the foregoing reasons, the Respondents respectfully request that this Honorable Court deny Medical Air's petition for a writ of certiorari.

Respectfully submitted,

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